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*874  
823*  
**No. 2277**

United States  
**Circuit Court of Appeals**  
For the Ninth Circuit.

JUDD E. CARPENTER,

Appellant,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
ETHEL D. COMPANY, a Corporation, MARICOPA 36 OIL COMPANY, a Corporation, WELLMAN OIL COMPANY, a Corporation, CLIFF OIL COMPANY, a Corporation, M. & T. OIL COMPANY, a Corporation, ASSOCIATED TRANSPORTATION COMPANY, a Corporation, STANDARD OIL COMPANY, a Corporation, ASSOCIATED OIL COMPANY, a Corporation, EMILIA E. GRAHAM, as Executrix of the Estate of F. M. GRAHAM, Deceased, R. E. GRAHAM, GEORGE E. WHITAKER, WILLIAM F. PHILLIPS, MARY A. BONYNGE, W. A. BONYNGE, W. C. PRICE, JOHN DOE, RICHARD ROE, SAMUEL COE, HARRY GREEN, JOHN BROWN, RICHARD BROWN, SAMUEL GRAY, RICHARD GRAY and HARRY BLACK,

Appellees.

**Transcript of Record.**

Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

**FILED**

JUL 26 1913



Records of U.S. Circuit  
Court of Appeals  
p 24



# INDEX OF PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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For Appellees M. & T. Oil Company, Associated Transportation Company, Standard Oil Company, and Associated Oil Company:

GEO. E. WHITAKER, Esq., Stoner Block, Bakersfield, California. [6\*]

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*In the District Court of the United States, Southern District of California, Northern Division.*

JUDD E. CARPENTER,

Complainant,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
ETHEL D. COMPANY, a Corporation,  
MARICOPA 36 OIL COMPANY, a Corporation,  
CLIFF OIL COMPANY, a Corporation,  
WELLMAN OIL COMPANY, a Corpora-

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\*Page number appearing at foot of page of original certified Record.

tion, M. & T. OIL COMPANY, a Corporation, ASSOCIATED TRANSPORTATION COMPANY, a Corporation, STANDARD OIL COMPANY, a Corporation, ASSOCIATED OIL COMPANY, a Corporation, EMILIA E. GRAHAM, as Executrix of the Estate of F. M. GRAHAM, Deceased, R. E. GRAHAM, GEORGE E. WHITAKER, WILLIAM F. PHILLIPS, MARY A. BONYNGE, W. A. BONYNGE, W. C. PRICE, JOHN DOE, RICHARD ROE, SAMUEL COE, HARRY GREEN, JOHN BROWN, RICHARD BROWN, SAMUEL GRAY, RICHARD GRAY and HARRY BLACK,

Defendants.

**Citation on Appeal.**

United States of America,—ss.

The President of the United States, to M. J. & M. & M. Consolidated, a corporation, Ethel D. Company, a corporation, Maricopa 36 Oil Company, a corporation, Wellman Oil Company, a corporation, Cliff Oil Company, a corporation, M. & T. Oil Company, a corporation, Associated Transportation Company, a corporation, Standard Oil Company, a corporation, Associated Oil Company, a corporation, Emilia E. Graham, as Executrix of the Estate of F. M. Graham, deceased, R. E. Graham, George E. Whitaker, William F. Phillips, Mary A. Bonynge, W. A. Bonynge, W. C. Price, John Doe, Richard Roe, Samuel Coe, Harry Green, John Brown, Richard

Brown, Samuel Gray, Richard Gray and [3]  
Harry Black, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at San Francisco, in the State of California, on the 1st day of May, 1913, being within thirty days from the date hereof, pursuant to an order allowing an appeal of the suit to said United States Circuit Court of Appeals, filed and entered in the Clerk's office of the District Court of the United States for the Southern District of California, Northern Division, from a certain order and decree made and entered in said District Court heretofore, to wit, on the 18th day of October, A. D. 1912, dismissing the bill of complaint of complainant in that certain suit in equity number 260, wherein Judd E. Carpenter is complainant and appellant, and you are defendants and appellees, to show cause, if any there be, why the said order and decree made and rendered against said appellant and so appealed from by him, as in the said order allowing the appeal mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

Given under my hand and the seal of the above-entitled court this 2d day of April, 1913.

ERSKINE M. ROSS,

U. S. Circuit Judge. [4]

Received copy of the within this 7th day of April, 1913.

HUNSAKER & BRITT and  
GEO. E. WHITAKER.

Attorneys for Defendants W. C. Price, Wellman Oil Co., and Cliff Oil Company.

Received copy of the within citation this 7th day of April, 1913.

J. W. McKINLEY,

Attorney for the Defendants, Mary A. Bonynge and  
W. A. Bonynge.

Received copy of the within Citation this 28th day of April, 1913.

THOMAS SCOTT and

C. E. ARNOLD.

Attorneys for Defendant, William F. Phillips.

Received copy of the within Citation this 28th day of April, 1913.

GEO. E. WHITAKER,

Attorney for Defendants M. J. & M. & M. Consolidated, Maricopa 36 Oil Co., Geo. E. Whitaker, R. E. Graham and Emilia E. Foutes, formerly Graham, Executrix, etc., Ethel D. Company, M. & T. Oil Co., Associated Transportation Co. Standard Oil Co. and Associated Oil Co.

[Endorsed]: No. 260. Original. In the District Court of the United States, Southern District of California, Northern Division. Judd E. Carpenter, Complainant, vs. M. J. & M. & M. Consolidated, a corporation et al., Defendants. Citation on Appeal. Filed Apr. 29, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [5]

**[Complaint.]**

*In the Circuit Court of the United States, in and for  
the Ninth Circuit, Southern District of Califor-  
nia, Northern Division.*

**IN EQUITY.**

**JUDD E. CARPENTER,**

**Plaintiff,**

vs.

**M. J. & M. & M. CONSOLIDATED, a Corporation,  
ETHEL D. COMPANY, a Corporation,  
MARICOPA 36 OIL COMPANY, a Cor-  
poration, CLIFF OIL COMPANY, a Cor-  
poration, WELLMAN OIL COMPANY, a  
Corporation, M. & T. OIL COMPANY, a Cor-  
poration, ASSOCIATED TRANSPORTA-  
TION COMPANY, a Corporation, STAND-  
ARD OIL COMPANY, a Corporation,  
ASSOCIATED OIL COMPANY, a Corpo-  
ration, EMILIA E. GRAHAM as Executrix  
of the Estate of F. M. GRAHAM, Deceased,  
R. E. GRAHAM, GEORGE E. WHITAKER,  
WILLIAM F. PHILLIPS, MARY A.  
BONYNGE, W. A. BONYNGE, W. C.  
PRICE, JOHN DOE, RICHARD ROE,  
SAMUEL COE, HARRY GREEN, JOHN  
BROWN, RICHARD BROWN, SAMUEL  
GRAY, RICHARD GRAY and HARRY  
BLACK,**

**Defendants.**

To the Honorable, the Judges of the Circuit Court of the United States in and for the Ninth Circuit, Southern District of California, Northern Division:

Judd E. Carpenter, a resident of the City and County of New York, State of New York, and a citizen of the State of New York, brings this his bill against the M. J. & M. & M. Consolidated, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal office at Oakland, in the State of California, and an inhabitant of the Northern District of California; and the Ethel D. Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its [9] principal office at Oakland, in the State of California, and an inhabitant of the Northern District of California; and the Maricopa 36 Oil Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal office at the City and County of San Francisco, State of California, and an inhabitant of the Northern District of California; and the Cliff Oil Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal office at the City of Los Angeles, County of Los Angeles, State of California, and an inhabitant of the Southern District of California; and the Wellman Oil Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal office at the City of Los Angeles,

County of Los Angeles, State of California, and an inhabitant of the Southern District of California; and the M. & T. Oil Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal office at Oakland, in the State of California, and an inhabitant of the Northern District of California; and the Associated Transportation Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal office at the City and County of San Francisco, State of California, and an inhabitant of the Northern District of California; and the Standard Oil Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal office at the City and County of San Francisco, State of California, and an inhabitant of the Northern District of California; and the Associated Oil Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal office at the City and County of San Francisco, State [10] of California, and an inhabitant of the Northern District of California; and Emilia E. Graham as executrix of the Estate of F. M. Graham, deceased, a citizen of the State of California, residing in Kern County, State of California, and an inhabitant of the Southern District of California; and R. E. Graham, George E. Whitaker and William F. Phillips, citizens of the State of California, residing at Bakersfield, Kern County, in the State of California; and Mary A. Bonynge, W. A. Bonynge, and

W. C. Price, citizens of the State of California, residing in the County of Los Angeles, State of California, and inhabitants of the Southern District of California.

## I.

And your orator shows unto your Honors and alleges that he, Judd E. Carpenter, is a resident of the City and County of New York, State of New York, and a citizen of the State of New York, and that the *M. J. & M. & M. Consolidated* and the *Ethel D. Company* and the *M. & T. Oil Company* are and for more than eighteen months last past have been corporations organized, existing and acting under and by virtue of the laws of the State of California, and each having its principal office and place of business at Oakland, in the County of Alameda, State of California, and are inhabitants of the Northern District of California, and that the *Cliff Oil Company* and the *Wellman Oil Company* are and for more than eighteen months last past have been corporations organized, existing and acting under and by virtue of the laws of the State of California, and having their offices and principal places of business in the County of Los Angeles, State of California, and are inhabitants of the Southern [11] District of California; and that the *Associated Transportation Company*, the *Standard Oil Company*, the *Associated Oil Company* and *Maricopa 36 Oil Company* are and for more than eighteen months last past have been corporations organized, existing and acting under and by virtue of the laws of the State of California, having their offices and principal places of business at

the City and County of San Francisco, State of California, and are inhabitants of the Northern District of California; and that Emilia E. Graham as executrix of the Estate of F. M. Graham, deceased, and R. E. Graham, and George E. Whitaker, and William F. Phillips are citizens of the State of California, and residents of the County of Kern, State of California, and inhabitants of the Southern District of California; and that Mary A. Bonyngé, W. A. Bonyngé, and W. C. Price are citizens of the State of California and residents of the County of Los Angeles, State of California, and inhabitants of the Southern District of California.

## II.

That ever since the 8th day of January, 1910, M. J. Hynes was and now is the regularly elected, qualified and acting Public Administrator of the City and County of San Francisco, State of California.

That he is, and ever since the 15th day of August, 1910, has continuously been, the duly appointed, qualified and acting Administrator of the Estate of Charles H. Gilman, deceased. That on and prior to the 15th day of August, 1910, such proceedings were had in the Superior Court of the City and County of San Francisco, State of California, in the matter of the Estate of Charles H. Gilman, deceased, that by an order of said Superior Court then duly given, made and entered in the matter of said Estate, said M. J. Hynes as such Public Administrator was appointed Administrator of the Estate of Charles [12] H. Gilman, deceased, and thereupon on the 15th day of August, 1910, letters of administration

of the Estate of said Charles H. Gilman, deceased, were duly issued to said M. J. Hynes as such Public Administrator in the matter of said Estate on the 15th day of August, 1910.

### III.

That F. M. Graham died testate on or about the 12th day of December, 1909, in the County of Kern, State of California, and, as plaintiff is informed and believes and therefore alleges, was a resident of said Kern County at the time of his death, and left estate therein. That by the last will and testament of said deceased, Emilia E. Graham was named therein as the sole executrix of said last will and testament. That thereafter, to wit, on the 10th day of January, 1910, after due and legal proceedings had, the Superior Court of the State of California, in and for the County of Kern, by its orders duly given and made in the matter of the Estate of F. M. Graham, deceased, duly admitted said last will and testament of said deceased to probate, and duly appointed Emilia E. Graham the executrix of the said estate of F. M. Graham, deceased. That thereafter, to wit, on the 10th day of January, 1910, said Emilia E. Graham, duly qualified as such executrix, and letters testamentary were duly issued to her out of said Court in the matter of said Estate, under the hand and seal of the Clerk of said Court, and that said letters have never been revoked, vacated or set aside; and that defendant Emilia E. Graham now is the duly appointed, qualified and acting executrix of the Estate of F. M. Graham, deceased.

## IV.

That prior to the 1st day of January, 1885, all the land in Township Twelve (12) North, Range Twenty-four (24) West, San [13] Bernardino Base and Meridian, had been surveyed and sectionized by the United States, and the duly approved plat thereof had been filed in the district land office of the United States within which district said land was then and now is situated.

That on and prior to the 1st day of August, 1888, the State of California was the owner of said Section Thirty-six (36), Township Twelve (12) North, Range Twenty-four (24) West, San Bernardino Base and Meridian.

## V.

That on or about the 1st day of August, 1888, one S. Davis made an affidavit affirming and stating therein that he, said affiant, was then a citizen of the United States, a resident of the State of California, over the age of twenty-one years, and said affiant further therein stated that he, said affiant, then desired to purchase of the State of California Section Thirty-six (36), Township Twelve (12) North, Range Twenty-four (24) West, San Bernardino Base and Meridian, under the provisions of Title VIII of the Political Code of the State of California; and said affiant further in said affidavit stated that there was then at the date of said affidavit no occupation of said land adverse to any occupation thereof then had by said affiant; and said affiant therein further stated that he, said affiant, desired to purchase the said land for his, said affiant's, own use and benefit

and for the use or benefit of no other person or persons whomsoever, and that he, said affiant, had made no contract or agreement to sell the same; and said affiant in said affidavit stated that the said land was not suitable for cultivation; and it was therein further stated that the said applicant had not entered any portion of the five hundred thousand acres granted to the State for school purposes, or the sixteenth or thirty-sixth sections of land selected in lieu thereof, which, together with said Section Thirty-six (36), Township Twelve (12) North, Range Twenty-four (24) West, San Bernardino Base and Meridian, [14] exceeded six hundred and forty (640) acres. That plaintiff is informed and believes and on that ground alleges that all the facts stated in said affidavit were true.

That plaintiff is informed and believes and upon such information and belief alleges: That on the 1st day of August, 1888, and for a long time prior thereto, said S. Davis was a citizen of the United States and a resident of the State of California, and over the age of twenty-one years, and on said day he desired to purchase of the State of California Section Thirty-six (36), Township Twelve (12) North, Range Twenty-four (24) West, San Bernardino Base and Meridian, under the provisions of Title Eight (8) of the Political Code of the State of California. That plaintiff is informed and believes and therefore alleges that on said first day of August, 1888, and for more than six months prior thereto, there was no occupation of said land last above described adverse to the said S. Davis, or adverse to any

occupation of said land by said S. Davis; that plaintiff is informed and believes and therefore alleges that said affiant S. Davis on said 15th day of August, 1888, at the time of making his application as alleged herein, desired to purchase the said land for the use and benefit of said S. Davis and for the use or benefit of no other person or persons whomsoever, and said S. Davis, on said 15th day of August, when said application to purchase alleged herein was made, had made no contract or agreement to sell the said land, or any part thereof, and said S. Davis never made any contract or agreement to sell the said land until the time of the transfer thereof herein alleged to said Charles H. Gilman. That plaintiff is informed and believes and therefore alleges that said land never was suitable for cultivation; that plaintiff is informed and believes and therefore alleges that said S. Davis never entered any portion of the five hundred thousand acres granted to the State for School purposes or the [15] sixteenth or thirty-sixth sections of land selected in lieu thereof, which, together with said Section Thirty-six (36), Township Twelve (12) North, Range Twenty-four (24) West, San Bernardino Base and Meridian, exceeded six hundred and forty (640) acres.

That there was and had been no occupation of said section for more than three months prior to said 1st day of August, 1888.

That the said S. Davis was a white male citizen of the United States.

That the said affidavit was in all respects, both of form and substance, as required by law and by the

provisions of Section 3495, Political Code of the State of California.

That on the 1st day of August, 1888, the said affidavit, the same being also the application of said S. Davis, to purchase said section of land, was filed in the office of the Surveyor-General of the State of California, and the filing fee required by law thereupon paid, and said application was there retained by said Surveyor-General and remained on file in his office for more than ninety days.

That on or about the 1st day of February, 1889, the Surveyor-General of the State of California approved the said application of said S. Davis to purchase the said Section Thirty-six (36), Township Twelve (12) North, Range Twenty-four (24) West, San Bernardino Base and Meridian, and issued and delivered to said S. Davis his approval of the said application of said Davis.

That the said Section Thirty-six (36) was not timber land, and was found by the Surveyor-General and in and by his said approval declared to be untimbered land and not suitable for cultivation. [16]

## VI.

That the said S. Davis, on the 15th day of February, 1889, presented to the County Treasurer of the County of Kern, within which County said Section Thirty-six (36) was then and is now situate, a copy of the said approval of said application to purchase, and thereupon paid to said County Treasurer on account of the purchase price of said land the sum of Twenty-five (25) cents per acre, together with interest at the rate of seven (7) per cent per

annum upon the unpaid balance of One Dollar per acre of said purchase price from the date of said approval to the first day of the following January, and also the legal fee for the certificate of purchase, and said sums so paid were then and there received by said County Treasurer, and said County Treasurer then and there endorsed his receipt for said money so paid to and received by him upon said certificate of location and returned the same so endorsed to said S. Davis.

## VII.

That immediately after making payment upon said approval to said County Treasurer as aforesaid, and on or about the 15th day of February, 1889, the said S. Davis duly presented his said approval, so endorsed as aforesaid, with the receipt of said County Treasurer, to the County Auditor in and for said County of Kern, and requested said Auditor to take notice of said payment to said County Treasurer and to make his charge of said sum so paid against said County Treasurer as required by law, and the said County Auditor thereupon endorsed upon said approval his said charge to said County Treasurer of said payment.

That the Register of the Land Office of the State of California thereafter and on or about the 20th day of March, 1889, received a statement from the said County Treasurer of said County of Kern, showing that said S. Davis had made the said payment to said County Treasurer, and thereupon, on the 20th day [17] of March, 1889, the said Register issued to and in the name of said S. Davis a certificate of

purchase of and for said Section Thirty-six (36), Township Twelve (12) North, Range Twenty-four (24) West, San Bernardino Base and Meridian, which said certificate showed and stated the class of land of said section, the number of acres therein, the price per acre, the date of payment, the date from which interest was to be computed, the amount paid, and the amount remaining unpaid. And said certificate of purchase was in the form and substance and contained all the statements and was authenticated as required by law.

### VIII.

That on or about the 1st day of April, 1890, the said S. Davis by an instrument in writing, sold and assigned the said certificate of purchase and all the right, title and interest of said S. Davis in and to said land in said certificate described, to said Charles H. Gilman.

### IX.

That on the 7th day of December, 1900, said Charles H. Gilman by an instrument in writing, and for a valuable consideration, sold, transferred and assigned to one Fred W. Lake, an undivided one-half ( $\frac{1}{2}$ ) interest in said Certificate of Purchase and all of the right, title and interest of said Charles H. Gilman in and to said land in said certificate described, and on the 7th day of December, 1900, said Charles H. Gilman by an instrument in writing and for a valuable consideration, sold, transferred and assigned to one H. H. Snow an undivided one fourth ( $\frac{1}{4}$ ) interest in said Certificate of Purchase and of and in all the right, title and interest of said Charles

H. Gilman in and to said land in said certificate described, and on or about the 14th day of April, 1910, said H. H. Snow by an instrument in writing and for a valuable consideration, sold, transferred and assigned to one J. B. Treadwell, said undivided one fourth ( $\frac{1}{4}$ ) interest in said certificate of purchase, and in [18] all right, title and interest of said H. H. Snow in and to said land in said certificate described.

#### X.

That on the 17th day of January, 1909, said Charles H. Gilman died intestate, at the City and County of San Francisco, State of California, and said Charles H. Gilman was, at the time of his death, a resident of the City and County of San Francisco, State of California.

That at the time of his death the said Charles H. Gilman was the owner of and entitled to the possession of an undivided one fourth ( $\frac{1}{4}$ ) interest in and to said land and in and to said certificate of purchase and all rights thereunder.

#### XI.

That said Charles H. Gilman left him surviving six children. That the wife of said Charles H. Gilman died before the said 17th day of January, 1909, and prior to the death of said Charles H. Gilman. That the names of said children are Eunice Mae Gilman, Mrs. Ruby Hagerdon (nee Ruby Gilman), Mrs. Mabel Corey (nee Mabel Gilman), Mrs. Pearl Alisky (nee Pearl Gilman), James Monroe Gilman, and Mrs. Cordelia Thompson (nee Cordelia Gilman).

## XII.

That certain of said children, to wit, James Monroe Gilman, Pearl Alisky, Eunice Mae Gilman, and Ruby Hagerdon, after the death of said Charles H. Gilman, made, executed and delivered a deed of conveyance sufficient to convey and conveying to one W. G. Deal, all their rights, titles and interests in and to said Section Thirty-six (36) and in and to said certificate of purchase and all rights thereunder, and such proceedings were thereafter had in the matter of said Estate of Charles H. Gilman, deceased, in the Superior Court of the City and County of San Francisco; that all the interests of James Monroe Gilman, [19] Pearl Alisky, Eunice Mae Gilman and Ruby Hagerdon in and to said land and said certificate of purchase, to wit, an undivided one sixth ( $\frac{1}{6}$ ) interest therein, was by a decree of partial distribution duly given, made and entered, distributed to said W. G. Deal.

## XIII.

That said W. G. Deal, on or about the 9th day of August, 1910, by an instrument in writing, sold, transferred, assigned and granted all his right, title and interest in and to said section of land and said certificate of purchase to this plaintiff, Judd E. Carpenter, and said Judd E. Carpenter is now the owner of and entitled to the possession of an undivided one sixth ( $\frac{1}{6}$ ) interest and part of said Section Thirty-six (36).

## XIV.

That plaintiff is informed and believes and on that ground alleges that all the facts herein alleged were

at all times known to all the defendants herein, and each of the defendants herein named claims some interest or estate in said land, which said claim or interest was acquired by said defendants directly from the defendant Mary A. Bonynge, or from some successor in interest of said Mary A. Bonynge, without consideration paid therefor; and each defendant at all times herein mentioned had notice of all the facts herein alleged.

#### XV.

That from said 20th day of March, 1889, to said transfer thereof to said Charles H. Gilman in the year 1890, the said S. Davis was the owner of and entitled to the possession of said land and of the said certificate of purchase and all rights thereunder; that said Charles H. Gilman from the time of said alleged transfer and assignment of said certificate and said land therein described to the said time of said alleged transfer to said Fred W. Lake and said H. H. Snow, was the owner of and entitled [20] to the possession of said land and of the said certificate of purchase, and all rights thereunder, and after said transfer and assignment of said alleged interest in said certificate of purchase and said land to said H. H. Snow and said Fred W. Lake to the said death of said Charles H. Gilman, said Charles H. Gilman and said Fred W. Lake and said H. H. Snow were the owners of and entitled to the possession of said land and of the said certificate of purchase and all rights thereunder, and from the death of said Charles H. Gilman to the transfer of said undivided one quarter ( $\frac{1}{4}$ ) interest in said land and said certifi-

cate of purchase by said H. H. Snow, to J. B. Treadwell, said Fred W. Lake, H. H. Snow and the heirs of said Charles H. Gilman subject to the administration of the estate of said Charles H. Gilman, deceased, were the owners of and entitled to the possession of said land, and of the said certificate of purchase and all rights thereunder, and after the transfer of said undivided one quarter ( $\frac{1}{4}$ ) interest in said land and said certificate of purchase from said Snow to said Treadwell down to the transfer of the said undivided one sixth ( $\frac{1}{6}$ ) interest in said land and said certificate of purchase by said heirs of said Charles H. Gilman to W. G. Deal, said Lake, Treadwell and said heirs of said Gilman subject to the administration of the estate of said Charles H. Gilman, deceased, were the owners of said land and said certificate of purchase and entitled to the possession of said land, and from the transfer of said undivided one sixth ( $\frac{1}{6}$ ) interest in said land and said certificate of purchase from said heirs of said Gilman to said Deal down to the transfer of said undivided one sixth ( $\frac{1}{6}$ ) interest in said land and said certificate of purchase from said Deal to said Judd E. Carpenter, said Lake, Treadwell, Deal and said heirs of said Charles H. Gilman subject to the administration of the estate of said Gilman, were the owners of and entitled to the possession of said land and said certificate of purchase, and that from the transfer [21] of said undivided one sixth ( $\frac{1}{6}$ ) interest in said land and said certificate of purchase from said Deal to said Carpenter down to the present date, said heirs of said Charles H. Gilman subject to

the administration of the estate of Charles H. Gilman, deceased, said Lake, Treadwell, and said Carpenter were and are the owners and entitled to the possession of said land and said certificate of purchase, and that the said heirs of said Charles H. Gilman subject to the administration of the estate of said Charles H. Gilman, deceased, and said J. B. Treadwell and said Fred W. Lake and said Judd E. Carpenter are now the owners of and entitled to the possession of said land and said certificate of purchase.

#### *XIV.*

That on the 25th day of January, 1909, the said State of California made and issued and delivered a patent of said above-described land to Mary A. Bonynge. That the said patent was issued and delivered to said Mary A. Bonynge without the consent of said S. Davis, said Charles H. Gilman, the said heirs of the said Charles H. Gilman, said H. H. Snow, said J. B. Treadwell, said Fred W. Lake, said W. G. Deal, or said plaintiff Judd E. Carpenter, or either or any of them.

That said Mary A. Bonynge was not the grantee or assignee of either of said S. Davis, or said Charles H. Gilman, or said heirs of said Charles H. Gilman, or said H. H. Snow, or said J. B. Treadwell, or said Fred W. Lake, or said W. G. Deal, or said plaintiff Judd E. Carpenter, or either or any of them, or of any grantee or person holding under or through them or either or any of them, to the whole or any part of said land described in said certificate of pur-

chase, or to any interest in said certificate of purchase or the rights thereunder enjoyed or held.

That plaintiff is informed and believes and therefore alleges that the said S. Davis did not and the said Charles H. Gilman did not, nor did the said heirs or successors of said [22] Charles H. Gilman mentioned herein, nor did the said successors of said heirs of said Charles H. Gilman ever consent to the holding of the title to said land, or to the possession of said land, or any part thereof, or the transfer of the said land or any part thereof by said Mary A. Bonynge, or any other person, except the persons alleged in said complaint herein to be the grantees of said Charles H. Gilman, and said Charles H. Gilman, during his lifetime, and his heirs and successors, since his death, have protested against all claims of said Mary A. Bonynge and her successors in and to said land and have not acquiesced therein.

## XVII.

That plaintiff does not know and is not informed of the amount of money paid or expended or liability incurred by Mary A. Bonynge in payment for the said patent for said land, or the expenses of procuring the same, or the price paid for the said land, and plaintiff is not advised and does not know the rights of the defendants as between themselves to be repaid or paid, the money expended or liability incurred by any, either or all of said defendants in paying for said land or the patent therefor, or the expenses incident to the purchase, acquisition or patent to said land; and plaintiff hereby asks the Court to adjudge the sum which the plaintiff should pay into said

Court or to said defendants, or either or any of them, and to determine and adjudge to whom the money so adjudged to be paid to the Court shall be paid, and the said plaintiff hereby expresses his willingness to pay and tenders to the Court and to said defendants any sum which should be so paid to the said defendants or either of them.

### XVIII.

Plaintiff alleges that on the 25th day of August, 1892, there was filed in the Superior Court of Kern County, State of California, an unverified complaint in words and figures as shown by Exhibit "A" hereunto attached. [23]

That thereupon a summons was issued as shown by Exhibit "B" hereunto attached.

That the said summons was placed in the hands of the Sheriff of the County of Kern, State of California, for service, and the said summons was thereafter returned by the said Sheriff with his return thereon and filed with the Clerk of said Superior Court of Kern County, which said return of said Sheriff is hereunto attached and marked Exhibit "C."

That plaintiff is informed and believes and therefore alleges that all acts and things done in the attempted service of said summons issued in the said action commenced by filing the said complaint on the 25th day of August, 1892, Exhibit "B" attached to the complaint, are alleged herein, and all proof of attempted service of said summons is herein alleged.

That the said summons was not served upon the said defendant S. Davis in said complaint mentioned,

personally or otherwise, and the said S. Davis had no notice or knowledge of the said proceedings in said Superior Court or said action until about the 1st day of October, 1900; that said Charles H. Gilman had no notice or knowledge of the said proceedings in said Superior Court prior to the 1st day of October, 1900.

That on the 6th day of September, 1892, an affidavit was filed in the Superior Court in the said action, which said affidavit is hereunto attached and marked Exhibit "D."

That on the 6th day of September, 1892, a purported order of said Court was signed by the Judge of said Court and filed in the records of said Court, in said action, a copy of which purported order is hereto attached and marked Exhibit "E."

That on the 19th day of December, 1892, an affidavit was filed in the said Superior Court in said action, a copy of which said affidavit is hereunto attached and marked Exhibit "F."

That there was endorsed on the back of the said complaint a statement in words and figures as shown by Exhibit "G" hereunto attached. [24]

That in said action a purported judgment was signed by the Judge and filed with the Clerk and entered in the Judgment Book, which said purported judgment is in words and figures as shown by the copy thereof hereunto attached and marked Exhibit "H."

That the statement in said purported judgment that the defendants had been regularly served with process was not true, and said defendant in said

action was never served with process; that the statement in said endorsement on the back of said complaint that the defendant in said action had been regularly served with process was not true; that the said Court was without jurisdiction to render any judgment in said action against the said defendant S. Davis, and that the said purported judgment is void, null and of no effect whatever.

That on the 4th day of January, 1893, the District Attorney of Kern County filed in the office of the Register of the State Land Office of the State of California, a certified copy of said purported judgment, and no other certified copy of said judgment was ever filed in said office of said Register.

That on the 16th day of January, 1893, the District Attorney of Kern County filed in the office of the County Recorder of the County of Kern, State of California, a certified copy of the said purported judgment, and no other copy of said judgment was ever filed in the office of the Recorder of said Kern County.

### XIX.

That neither the said S. Davis nor the said Charles H. Gilman ever had any knowledge or notice of the filing of said certified copy of said purported judgment in the office of the said Register or in the office of the said Recorder prior to the 1st day of October, 1900.

That on the 14th day of December, 1900, said Fred W. Lake filed a notice of motion in the said action so commenced [25] in said Kern County, which said notice of motion is in words and figures as shown by

Exhibit "I" hereunto attached.

That said notice of motion was filed in said action on the 14th day of December, 1900, and was then served upon the District Attorney of Kern County, J. W. Ahern, Esq.

That there was filed and served as aforesaid with said notice of motion an affidavit of Fred W. Lake, a copy of which is hereunto attached and marked Exhibit "J."

That on the 28th day of December, 1900, there was served upon said J. W. Ahern, Esq., the District Attorney of Kern County, and filed in said Superior Court in said action, a further notice of motion, a copy of which said notice last mentioned is hereunto attached and marked Exhibit "K."

That with the said last-mentioned notice of motion there was filed and served the affidavit of Charles H. Gilman, in words and figures as shown by Exhibit "L" hereunto attached.

That with said notice of motion last mentioned there was served and filed the affidavit of S. Davis, a copy of which is hereunto attached and marked Exhibit "M."

That after the hearing of said motion the said Superior Court of Kern County made and entered its order in said above-entitled action, in words and figures as shown by a copy thereof hereunto attached and marked Exhibit "N."

## XX.

That prior to and immediately after the making of said order last mentioned, a diligent search was made by said Charles H. Gilman and those owning

under said and with said Charles H. Gilman, for said certificate of purchase issued to said S. Davis, and the said certificate of purchase could not be found, and the same could not be presented to the County Treasurer to have endorsed thereon payments made of interest or principal required to be paid the State of California upon said certificate of purchase [26] for the purchase price of said land therein described.

That diligent search to find said certificate of purchase was continued by said Charles H. Gilman and those owning under and with said Charles H. Gilman, but the same could not be found, and on the 28th day of December, 1900, a claim was made by said Charles H. Gilman to the Register of the State Land Office of the State of California, and to the Surveyor-General of the State of California, that the said certificate had been lost and was beyond the control of the owners thereof as aforesaid, and before the hearing by said Register on said claim, the then owners as aforesaid of said certificate of purchase made affidavit that they had not sold said certificate of purchase or the land therein described, and said then owners as aforesaid published a notice in a newspaper in the said County of Kern and of general circulation in said County for four weeks, in which notice so published the certificate and the land for which the same was issued were described, and in said notice the name of the person to whom the said certificate was issued was stated, and in said notice the persons then claiming to own the said certificate were stated, and also there was therein stated the

time and place of the hearing before the Register of the State Land Office of the State of California ; that at the time and place of hearing stated in said notice the Register of the State Land Office took testimony concerning the loss, destruction and reason why the said certificate was beyond the control of the then owners thereof ; that by the said testimony then produced by the then Register it was satisfactorily proved that the said certificate was lost or destroyed, and that the same was beyond the control of the said persons then owning the same, and the said Register, after said taking of testimony and the hearing thereon, issued and delivered to the then owners of said certificate a duplicate certificate with the word "duplicate" written across the face thereof in red ink. [27]

## XXI.

That after said duplicate certificate was issued in the year 1900, the then owners of said certificate, to whom was issued and delivered the said duplicate certificate, presented the same to the County Treasurer of Kern County, State of California, together with the sum of money then due and owing for interest on the purchase price, together with the costs of the said action so commenced in Kern County against the said S. Davis, and demanded that the said interest be credited and endorsed upon said certificate of purchase, and that the same be received by the said County Treasurer in payment of the interest due upon said purchase of said land and in payment of said costs and expenses of said suit ; that the said County Treasurer of Kern County refused to receive

the said money, so offered and tendered to him as aforesaid, and refused to make any endorsements upon said duplicate certificate of purchase.

### XXII.

That on the 21st day of October, 1901, a notice of motion was filed and served in the said action so commenced in Kern County, State of California, a copy of which said notice of motion is hereunto attached and marked Exhibit "O."

That on the 11th day of December, 1901, the Superior Court of Kern County made, filed and entered its order, a copy of which is hereunto attached and marked Exhibit "P."

That after the 11th day of December, 1901, an appeal to the Supreme Court of the State of California was taken and prosecuted from said order of said Court made on the 11th day of December, 1901, which said appeal was prosecuted before said Supreme Court of the State of California, and the said Supreme Court of the State of California affirmed the said order of said Superior Court made on the 11th day of December, 1901, by its [28] judgment on the 23d day of June, 1904, and a remittitur from the Supreme Court of the State of California was issued on the 23d day of July, 1904, and it was filed in the office of the County Clerk of Kern County on the 25th day of July, 1904.

### XXIII.

That on the 25th day of July, 1900, an action was commenced by filing a complaint in the Superior Court of Kern County, State of California, by Thomas L. Moran against Mary A. Bonynge, for

the purpose of contesting the right of said Mary A. Bonynge to purchase of the State of California, under a purported certificate of purchase theretofore issued to her, and alleging the facts necessary to show that said Thomas L. Moran was entitled to purchase said land, a copy of which said complaint is hereunto attached and marked Exhibit "Q," and is hereby referred to and made a part hereof.

That on the 31st day of December, 1900, the Superior Court duly made and entered an order granting the right of intervention in said action so commenced by said Thomas L. Moran to Charles H. Gilman, H. H. Snow and Fred W. Lake, a copy of which said order is hereunto attached and marked Exhibit "R," and hereby referred to and made a part hereof; that on said last-named date the said Gilman, Snow and Lake filed a complaint in intervention in said action, a copy of which said complaint in intervention is in the words and figures as contained in Exhibit "S" hereunto attached and hereby referred to and made a part hereof.

That Exhibit "S," although entitled "Amended Complaint in Intervention," was in fact the first complaint in intervention, and was in fact the first complaint in intervention filed by said intervenors in said action. Said complaint in intervention was designated as an Amended Complaint in Intervention, by [29] reason of the fact that said intervenors had attached a copy of their complaint in intervention to the notice of motion for permission to file said complaint in intervention, which copy was identical with said Amended Complaint in Interven-

tion, but was entitled Complaint in Intervention, and for the purpose of distinguishing the Complaint in Intervention that was filed from the copy that was annexed to the motion for permission to file the intervention, the complaint that was filed was designated as an Amended Complaint in Intervention, and said paper so entitled Amended Complaint in Intervention was the first complaint in intervention filed by said intervenors.

That immediately after the filing of said Amended Complaint in Intervention said Mary A. Bonynge, on the 7th day of January, 1901, filed her demurrer to said complaint in intervention, and the plaintiff in said action filed his demurrer to said complaint in intervention on the 10th day of January, 1901.

That thereafter said demurrers to the complaint in intervention so filed were argued before said Court, and on the 31st day of July, 1907, the said demurrers were sustained by the said Court, and on the 18th day of July, 1907, an order was made by said Superior Court of Kern County extending the time of Mary A. Bonynge to answer said complaint filed in said action, and said Mary A. Bonynge filed her answer in said action on the 27th day of July, 1907, a copy of which said answer is hereunto attached and marked Exhibit "T."

That on the 28th day of December, 1907, a Second Amended Complaint in Intervention was filed in said court by Charles H. Gilman, H. H. Snow and Fred W. Lake, a copy of which said Second Amended Complaint in Intervention is hereunto attached and marked Exhibit "U."

That thereafter the defendant Mary A. Bonynge and the [30] plaintiff Thomas L. Moran, filed demurrers in said Court to said Second Amended Complaint in Intervention.

That said demurrers to said Second Amended Complaint in Intervention were sustained by order of said Court on the 13th day of January, 1908, and by said order sustaining said demurrers the plaintiffs in said Second Amended Complaint in Intervention were denied the right to amend said Second Amended Complaint in Intervention.

That on the 7th day of April, 1908, said defendant Mary A. Bonynge in said action filed her Amended Answer in said Superior Court of Kern County.

That on the 19th day of May, 1908, the said Superior Court of Kern County made and entered its final judgment in said case, adjudging the rights of the plaintiff Thomas L. Moran and defendant Mary A. Bonynge in said action and did not adjudge the rights of said intervenors or either of them, nor did said Court try or determine the rights of said intervenors or either of them on the merits in said action.

That after the entry of said judgment the said Charles H. Gilman, H. H. Snow and Fred W. Lake appealed to the Supreme Court of the State of California from said judgment of the Superior Court of Kern County, and proceedings were had on said appeal in said Supreme Court to and until the 7th day of February, 1910, on which last-named day the Supreme Court of the State of California by its judgment affirmed the said judgment of said Superior Court of said County of Kern, and on the 20th day

of March, 1910, a remittitur from the Supreme Court of the State of California was filed with the Clerk of the Superior Court of Kern County, State of California.

#### XXIV.

That on the 1st day of March, 1909, Fred W. Lake and H. H. Snow commenced an action in the Superior Court of Kern [31] County, State of California, against Mary A. Bonynge and John Doe by filing a complaint in said Court, a copy of which said complaint is hereunto attached and marked as Exhibit "V."

That on the 9th day of March, 1909, the said Mary A. Bonynge and W. A. Bonynge filed an answer in said action last named, a copy of which said answer is hereunto attached and marked Exhibit "W."

That in said action last mentioned a judgment was made and entered on the 1st day of June, 1909, in favor of defendants and against plaintiffs, from which judgment and an order denying a motion for a new trial in said action the said Fred W. Lake and H. H. Snow perfected an appeal to the Supreme Court of the State of California; that on the 9th day of October, 1911, said Supreme Court by its judgment affirmed the said judgment of said Superior Court of said County of Kern, and on the — day of November, 1911, a remittitur from said Supreme Court was filed with the Clerk of said Superior Court of said Kern County.

#### XXV.

And plaintiff further alleges that the said defendants are and for a long time past have been extract-

ing and taking from said land petroleum oil, and selling the said oil, and spending part of the proceeds of the sales of said oil, and paying and declaring dividends from the proceeds of sale of said oil to the stockholders of said defendant corporations. That the stockholders of said defendant corporations are numerous and unknown to the plaintiff and many of them reside in parts of the United States outside of the State of California, and the value of said land is principally for its oil producing property, and said oil will be extracted and sold before the termination of this suit; and many of said stockholders are insolvent, and [32] all of said corporations so taking and extracting said oil and selling the same are insolvent. That the said defendants threaten to and will continue to extract said oil and sell the same, to the great and irreparable damage of the plaintiff; that unless enjoined and restrained by this Court pending this litigation, and a Receiver be appointed to take possession of said land, and extract said oil and sell the same and retain the proceeds thereof to await the judgment of this Court, the said oil and its proceeds will be lost to the said plaintiff to his great and irreparable damage. That the amount of the said oil which has been taken from said land and the proceeds of the sale thereof by defendants are unknown to the plaintiff, and the plaintiff has no means of obtaining such knowledge except by an accounting at the instance and command of this Court.

## XXVI.

That the true names of said defendants John Doe, Richard Roe, Samuel Coe, Harry Green, John

Brown, Richard Brown, Samuel Gray, Richard Gray and Harry Black are unknown to this plaintiff, and they are therefore designated by fictitious names, and plaintiff prays leave of the above-entitled court to insert the true name of each of such defendants herein when ascertained.

### XXVII.

That plaintiff herein has no plain, speedy or adequate remedy at law in the premises.

### XXVIII.

That the matter in dispute herein, to wit, the said undivided one sixth ( $\frac{1}{6}$ ) interest of plaintiff in said Section Thirty-six (36), Township Twelve (12) North, Range Twenty-four (24) West, San Bernardino Base and Meridian, exceeds, exclusive of all interest and costs, the sum of Two Thousand Dollars [33] (\$2,000); that said undivided one sixth ( $\frac{1}{6}$ ) interest of plaintiff in said Section Thirty-six (36) exceeds in value the sum of One Million Dollars (\$1,000,000).

And plaintiff alleges that all the said acts, doings and claims of the said defendants herein are contrary to equity and good conscience and tend to the manifest wrong, and injury and oppression of plaintiff in the premises. In consideration whereof and forasmuch as plaintiff is remediless in the premises at and by the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable. To the end, therefore, that the said defendants may, if they can, show why plaintiff should not have the relief hereby prayed for, and may answer in the

premises, but not upon oath or affirmation, the benefit whereof is expressly waived by plaintiff.

And that it be adjudged and decreed that the said defendants *M. J. & M. & M. Consolidated* (a corporation), *Ethel D. Company* (a corporation), *Maricopa 36 Oil Company* (a corporation), *Cliff Oil Company* (a corporation), *Wellman Oil Company* (a corporation), *M. & T. Oil Company* (a corporation), *Associated Transportation Company* (a corporation), *Standard Oil Company* (a corporation), *Associated Oil Company* (a corporation), *Emilia E. Graham*, as executrix of the estate of *F. M. Graham*, deceased, *R. E. Graham*, *George E. Whitaker*, *William F. Phillips*, *Mary A. Bonynge*, *W. A. Bonynge*, *W. C. Price*, *John Doe*, *Richard Roe*, *Samuel Coe*, *Harry Green*, *John Brown*, *Richard Brown*, *Samuel Gray*, *Richard Gray*, and *Harry Black*, hold the title to an undivided one sixth ( $\frac{1}{6}$ ) of said Section Thirty-six (36), Township Twelve (12) North, Range Twenty-four (24) West, San Bernardino Base and [34] Meridian, in trust for the use and benefit and enjoyment of plaintiff; and that the said *M. J. & M. & M. Consolidated* (a corporation), *Ethel D. Company* (a corporation), *Maricopa 36 Oil Company* (a corporation), *Cliff Oil Company* (a corporation), *Wellman Oil Company* (a corporation), *M. & T. Oil Company* (a corporation), *Associated Transportation Company* (a corporation), *Standard Oil Company* (a corporation), *Associated Oil Company* (a corporation), *Emilia E. Graham* as executrix of the Estate of *F. M. Graham*, deceased, *R. E. Graham*, *George E. Whitaker*, *William F. Phillips*, *Mary A.*

Bonynge, W. A. Bonynge, W. C. Price, John Doe, Richard Ro , Samuel Coe, Harry Green, John Brown, Richard Brown, Samuel Gray, Richard Gray, and Harry Black and each of them, be directed and commanded to execute a deed of conveyance sufficient in form to convey and conveying an undivided one sixth ( $\frac{1}{6}$ ) of the said land to plaintiff, and failing therein that a commissioner be appointed by this Court to make and execute said conveyance; and that defendants account to this plaintiff for all the oil, petroleum and natural gas extracted and removed by defendants from said premises.

That pending the litigation upon motion of the plaintiff a Receiver be appointed to take and receive all the rents, issues and profits of said lands, and with such other power and authority as this Court may be advised is meet and agreeable to equity, and that an injunction be made and issued by this Court restraining the defendants, and each of them pending this action, from taking or extracting oil from said land, or from selling any oil now on this land which was taken from said land, and for such further relief as to equity may seem meet and proper, and for an accounting by each of said defendants of the amount of oil taken from said land and of the proceeds of sales of oil made by each of said defendants, and for costs of suit herein expended. [35]

May it please your Honors to grant unto the plaintiff a writ of subpoena, to be directed to the said defendants M. J. & M. & M. Consolidated (a corporation), Ethel D. Company (a corporation), Mari-copa 36 Oil Company (a corporation), Cliff Oil Com-

pany (a corporation), Wellman Oil Company (a corporation), M. & T. Oil Company (a corporation), Associated Transportation Company (a corporation), Standard Oil Company (a corporation), Associated Oil Company (a corporation), Emilia E. Graham as Executrix of the Estate of F. M. Graham, deceased, R. E. Graham, George E. Whitaker, William F. Phillips, Mary A. Bonynge, W. A. Bonynge, W. C. Price, John Doe, Richard Roe, Samuel Coe, Harry Green, John Brown, Richard Brown, Samuel Gray, Richard Gray and Harry Black, commanding them, and each of them, at a certain time, and under a certain penalty therein to be limited, personally to appear before this Honorable Court, and then and there full, true, direct, and perfect answer make to all and singular the premises, and further to stand to, perform and abide such further order, direction and decree therein as to this Honorable Court shall seem meet.

And plaintiff will ever pray.

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Complainant.

W. D. COLE,

Solicitor for Complainant. [36]

State of California,

County of Alameda.

W. D. Cole, being first duly sworn, deposes and says: That he is the solicitor for plaintiff in the above-entitled action; that he has his office in Oakland, in the County of Alameda, State of California; that the plaintiff is and for a long time has been absent from said County of Alameda; that the plaintiff

is and for a long time has been in New York City, in the State of New York; that affiant makes this affidavit for and on behalf of plaintiff; that affiant has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

W. D. COLE.

Subscribed and sworn to before me this 29th day of December, 1911.

[Seal] M. K. JACOBUS,  
Notary Public in and for the County of Alameda,  
State of California. [37]

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**Exhibit "A" [to Complaint—Complaint in People  
v. Davis].**

*In the Superior Court of the State of California in  
and for the County of Kern.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

S. DAVIS,

vs.

Defendant.

**COMPLAINT TO FORECLOSE AND ANNUL  
CERTIFICATE OF PURCHASE OF STATE  
LANDS.**

The People of the State of California, by Alvin Fay, District Attorney of the County of Kern, complain of said defendant, and for cause of action allege and show to the Court:

That, in pursuance of the laws of the State of California, in such cases made and provided, S. Davis did apply for, and thereafter, to wit, on the 20th day of March, 1889, received and became the owner and holder of Certificate of Purchase No. 11,487, from the Register of the State Land Office of the State of California, under his hand and seal of office, which office was duly authorized and empowered to issue such certificate of purchase of the lands claimed by the State aforesaid and situated in the County of Kern, and particularly described as follows:

In location No. 9735 surveyed lands, San Francisco, California, Land District, all of Section 36, Township 12 N. of Range 24 W., San Bernardino Base and Meridian, containing six hundred and forty acres, which said certificate of purchase did show the class of land purchased, the number of acres, the price per acre, the date of payment, the date from which interest shall be computed, the amount paid, and the amount unpaid, and [38] that the amount paid on account upon the land herein described was \$201.07, and the amount remaining unpaid and delinquent upon the same, according to the statement of said Register, hereinafter mentioned, was and is \$640.00 principal, and \$134.40 interest, gold or silver coin of the United States, which sums now remain wholly due and unpaid and delinquent, according to the provisions of the Political Code, Title VIII, Chapter 1, Article VI.

That said Register of the State Land Office did, on the 1st day of May, 1892, prepare and forward to the District Attorney of the County of Kern, as in

said law provided, the statement embracing all the lands in the county upon which payment had not been made according to law, and said District Attorney did receive the same on or about the 20th day of May, 1892.

That said statement did show the name of the purchaser, the number and date of the survey or location, and of the certificate of purchase, the amount paid, the amount unpaid, and the amount then due; and that said S. Davis was the purchaser, and became the owner and holder of the certificate of purchase of the above-described land, and paid on account therefor the sum of \$201.07, leaving the sum of \$640.00 remaining unpaid as principal and the sum of \$134.40 then and now due from said defendant as interest, on account of purchase as aforesaid, which sum of \$134.40 is now wholly delinquent according to the provisions of said law.

That in accordance with the provisions of said law, the interest on any principal or interest due on said lands of the State should be due and payable in advance, and that the day and date fixed and determined by said law was and is the 1st day of January in each year, and that the amount unpaid as aforesaid as interest, became due and payable from said defendant [39] on the 1st day of January, A. D. 1892, which sum has not been paid hitherto, or any part thereof.

That, upon the receipt of the statement aforesaid, on the 20th day of May, A. D. 1892, by said District Attorney, from the Register of the State Land Office, which statement by said law is termed and denomi-

nated "Delinquent List," said District Attorney did, in accordance with Section 3547 of said Political Code, give notice as therein provided that on a certain day, to wit, the 30th day of June, A. D. 1892, if the said amount, \$134.40, due and delinquent as aforesaid, should not be paid within fifty (50) days after the date of giving said notice, to wit, the 19th day of August, A. D. 1892, action would be commenced to foreclose the interest of said S. Davis in the lands herein described, and to cancel and render null and void said certificate of purchase.

And that said delinquent list with said notice appended was published for four consecutive weeks, immediately following the date of said notice, in the Kern County "Echo," a public newspaper, published at Bakersfield, in the County of Kern, and circulated therein.

That the first publication thereof was made in said paper the 30th day of June, 1892, and the last on the 28th day of July, 1892.

That said publication did state that, if the amount due and delinquent as aforesaid, was not paid within fifty (50) days from date thereof, suit would be commenced at the expiration of fifty days to foreclose the interests of the purchasers in the land herein described, and to cancel and annul the certificate of purchase to the same.

That fifty days have elapsed and expired since the date of giving said notice as aforesaid before instituting this action, and the amount, \$134.40, due and delinquent as aforesaid [40] from said defendant, has not been paid, nor any part thereof.

That the defendant is now the lawful owner and holder of said certificate of purchase.

Wherefore, said plaintiffs ask this Court to render judgment foreclosing all the interests of said defendant in and to the certificate of purchase of the above-described land, and that said certificate of purchase be canceled, and henceforth rendered null and void, and that all persons claiming under said defendant subsequent to the execution of said certificate of purchase either as purchasers, encumbrancers, or otherwise, may be barred and foreclosed of all right, claim or equity of redemption in and to said certificate of purchase of the above-described land, and that plaintiffs may have judgment and execution against said defendant for the expenses and cost of these proceedings, which costs shall include Ten Dollars compensation of the District Attorney, and that plaintiffs may have such other and further relief in the premises as the case may require and to this Court may seem just and equitable.

ALVIN FAY,

District Attorney of the County of Kern.

By J. E. PATTEN,

Assistant District Attorney.

[Endorsed]: Filed Aug. 25, 1892. N. R. Packard,  
Clerk. By H. L. Packard, Deputy Clerk. [41]

**Exhibit "B" [to Complaint—Summons].**

(Title of Court and Cause.)

**SUMMONS.**

Action brought in the Superior Court of the State of California, in and for the County of Kern, and

the complaint filed in the said County of Kern,  
in the office of the Clerk of said Superior Court.  
People of the State of California Send Greeting to  
S. Davis, Defendant:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the Superior Court of the State of California in and for the County of Kern, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons, if served within the county, or, if served elsewhere, within thirty days, or judgment by default will be taken against you, according to the prayer of said complaint.

The said action is brought to obtain a decree of this Court for the foreclosure of the right, title and interest of defendant in and to certain State school lands described in the complaint and purchased by the said S. Davis on the 20th day of March, A. D. 1889, and described as follows, to wit: Location No. 9735, of Kern County, State School lands. All of Section 36 in Township 12 North, of Range 24 West, S. B. B. and M., that the certificate of purchase No. 11,487 and other evidence of title held by defendant may be declared null and void, and for costs of suit herein expended; and also that the said defendant and all persons claiming by, through or under him may be barred and foreclosed of all right, title, claim, lien, equity of redemption and interest in and to said premises and for other and further relief.

[42]

And you are hereby notified that if you fail to appear and answer the said complaint as above re-

quired, the said plaintiff will take default against you and apply to the Court for the relief demanded in the complaint.

Given under my hand and the Seal of the Superior Court of the State of California in and for the County of Kern, this Aug. 25, 1892, in the year of our Lord one thousand eight hundred and ninety-two.

[Seal]

N. R. PACKARD,

Clerk.

By H. L. Packard,

Deputy Clerk.

[Endorsed]: Filed Aug. 30, 1892. N. R. Packard, Clerk. By H. L. Packard, Deputy Clerk. Alvin Fay, District Attorney. [43]

**Exhibit "C" [to Complaint—Return of Sheriff on Summons].**

Office of the Sheriff of the County of Kern.

I hereby certify that I received the within summons on the 27th day of August, A. D. 1892, and that, after due search and diligent inquiry, I have been unable to find the within-named defendant, S. Davis, in Kern County.

Dated, this 30th day of August, A. D. 1892.

H. L. BORGWARDT, Jr.,

Sheriff.

By Geo. Coleman,

Deputy Sheriff. [44]

**Exhibit "D" [to Complaint—Affidavit of J. E. Patten].**

(Title of Court and Cause.)

J. E. Patten, being duly sworn, says:

That I am now, and for one year last past have

been the duly elected, qualified and acting Assistant District Attorney in and for Kern County, State of California; that I am the attorney of record for plaintiff in the above-entitled action; that the complaint in said action was filed with the Clerk of this Court on the 25th day of August, 1892, and summons thereon issued; that said action is brought to obtain a judgment of this Court foreclosing all the interest of said defendant in and to all the following described land, situate, lying and being in Kern County, State of California, to wit: Sec. 36, Twp. 12 North, of Range 24 West, S. B. B. and M.

And that the Certificate of Purchase hereinbefore issued to said defendant therefore be canceled and henceforth rendered null and void, and that all persons claiming under said defendant subsequent to the execution of said certificate of purchase, either as purchaser, encumbrancer or assignee, may be barred and foreclosed of all interest, right or claim in and to the above described land and that plaintiff may have judgment against said defendant for the costs of these proceedings, which costs shall include Ten Dollars compensation of the District Attorney, and for such other and further relief in the premises as the case may require and as to this Court may seem just and equitable.

That affiant had made diligent inquiry to find said defendant, but cannot, after due diligence, find him in this State; that affiant did, on the 27th day of August, 1892, deliver the summons heretofore issued out of this Court in the above-entitled action to the Sheriff of Kern County with instructions [45] to

serve the same on said defendant; that thereafter, to wit, on the 30th day of August, 1892, said Sheriff returned said summons to the Clerk of this Court with his return endorsed thereon that said defendant could not be found in Kern County, State of California; that the residence of said defendant is unknown to affiant; that said defendant is the person to whom was issued said certificate of purchase, and is a necessary and proper party to the complete determination of this action. Personal service cannot be made on said defendant, and I therefore demand that this Honorable Court make an order that service of the same be made by publication.

J. E. PATTEN.

Subscribed and sworn to before me this 6th day of Sept., 1892.

ALVIN FAY,  
Notary Public.

[Endorsed]: Filed Sep. 6, 1892. N. R. Packard, Clerk. By H. L. Packard, Deputy Clerk. [46]

**Exhibit "E" [to Complaint—Order for Publication of Summons].**

(Title of Court and Cause.)

**ORDER FOR PUBLICATION OF SUMMONS.**

Upon reading and filing the affidavit of J. E. Patten, Assistant District Attorney and attorney for Plaintiff, and it appearing to me therefrom that said defendant cannot after due diligence, be found within this State, and it also appearing from the complaint filed herein, Aug. 25, 1892, that a cause of action exists in favor of plaintiff and against the defendant, and that the defendant is a necessary

and proper party to said action; and it further appearing that a summons has been duly issued herein, and that personal service of the same cannot be made upon the said defendant for the reasons hereinbefore contained, and by the said affidavits made to appear, on motion of Alvin Fay, District Attorney and attorney for plaintiff, it is ordered that the service of the summons in this action be made upon the defendant by publication thereof in the Kern County "Echo," a newspaper published at Bakersfield, Kern County, California, hereby designated as a newspaper most likely to give notice to said defendant; that such publication be made at least once a week for four weeks.

Dated July, Sept. 6th, 1892.

A. R. CONKLIN,  
Judge of the Superior Court.

[Endorsed]: Filed Sep. 6, 1892. N. R. Packard,  
Clerk. By H. L. Packard, Deputy Clerk. [47]

**Exhibit "F" [to Complaint—Affidavit of Publication  
of Summons].**

**AFFIDAVIT OF PUBLICATION OF SUMMONS.**

(Title of Court and Cause.)

State of California,  
County of Kern,—ss.

I, S. C. Smith, of said County and State, do solemnly swear that I am of lawful age, and am one of the publishers of the Kern County "Echo," a newspaper printed and published weekly in said County, and as such have control and management of the advertisements published therein; that the Notice,

of which the annexed is a printed copy, was published in said newspaper for ten consecutive weeks, as follows: In the issue of

Thursday, September 22, 1892.  
Thursday, September 29, 1892.  
Thursday, October 6, 1892.  
Thursday, October 13, 1892.  
Thursday, October 20, 1892.  
Thursday, October 27, 1892.  
Thursday, November 3, 1892.  
Thursday, November 10, 1892.  
Thursday, November 17, 1892.  
Thursday, November 24, 1892.

In the regular and entire issues of every number of said paper during the period and time of publication, and that the notice was published in the newspaper proper and not in a supplement.

S. C. SMITH.

Subscribed and sworn to before me, this 19th day of Dec. 1892.

ALVIN FAY,

Notary Public in and for Kern County, California.

[48]

Copy of Notice.

Summons.

No. 1431.

*In the Superior Court of the State of California, in  
and for the County of Kern.*

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

vs.

S. DAVIS,

Defendant.

Action brought in the Superior Court of the State of California, in and for the County of Kern, and the complaint filed in said County of Kern, in the office of the Clerk of said Superior Court. The People of the State of California Send Greeting to S. Davis, Defendant.

You are hereby required to appear in an action brought against you by the above named plaintiff in the Superior Court of the State of California in and for the County of Kern, and to answer the complaint filed therein within ten days (exclusive of the day of service) after the service on you of this summons—if served within this county, or, if served elsewhere within thirty days, or judgment by default will be taken against you, according to the prayer of said complaint. The said action is brought to obtain a decree of this Court for the foreclosure of the right, title and interest of defendant in and to certain state school lands, described in the complaint and purchased by said S. Davis on the 2<sup>th</sup> day of March, A. D. 1889, and described as follows, to wit: Location No. 9735, of Kern County State School Lands, all of Section Thirty-six (36) in Township Twelve (12) North, of Range Twenty-four (24) West, San Bernardino Base and Meridian, that the certificate of purchase No. 11,487 and other evidence of title held by defendant may be declared null and void, and for costs of suit herein expended; and also that said defendant and all persons claiming by, through or under him may be barred and foreclosed of [49] all right, title, claim, lien, equity of redemption, and interest in and to said premises, and for other and further relief.

And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will take default against you and apply to the Court for the relief demanded in the complaint.

Given under my hand and the Seal of the Superior Court of the State of California in and for the County of Kern, this 2<sup>th</sup> day of August, in the year of our Lord one thousand eight hundred and ninety-two.

[Seal]

N. R. PACKARD,  
Clerk.

By H. L. Packard,  
Deputy Clerk.

ALVIN FAY,  
District Attorney,  
Attorney for Plaintiff.

Said affidavit of publication being endorsed:

"Filed this 19th day of Dec., A. D. 1892. N. R. Packard, Clerk. By H. L. Packard, Deputy Clerk."

[50]

**Exhibit "G" [to Complaint—Default].**

In this action the defendant, having been regularly served with process, and having failed to appear and answer the complaint on file herein, and the time allowed by law for answering having expired, the default of said defendant in the premises is hereby duly entered according to law.

Attest my hand, and the seal of said Court, this 27th day of December, 1892.

[Seal]

N. R. PACKARD,  
Clerk.

By H. L. Packard,  
Deputy Clerk. [51]

**Exhibit "H" [to Complaint—Decree].**

(Title of Court and Cause.)

In this action the defendant having been regularly served with process, as required by law, and having failed to appear and answer the complaint of plaintiffs herein and the legal time for answering having expired, and the default of said defendants having been duly entered according to law.

And said cause having been brought on regularly to be heard on the 27th day of December, A. D. 1892, Alvin Fay, District Attorney of said County, appearing for plaintiff; and the same having been duly submitted to the Court, and the Court having heard the proofs necessary to enable it to render a judgment herein, and it duly appearing to the Court that all the allegations in said complaint are true.

That on the 20th day of March, A. D. 1889, the said defendant did receive and become the owner and holder of Certificate of Purchase No. 11,487, and thereby became the purchaser of certain State School lands situate in the County of Kern, State of California, and described in said Certificate of Purchase and the complaint herein, as follows, to wit: Location No. 9735, surveyed lands, Los Angeles, California, Land District, Section 36, Township 12 North, of Range 24 West, San Bernardino Base and Meridian, containing 640 acres.

That the amount due, unpaid and delinquent as interest on the 1st day of January, 1892, was \$134.40.

Now, therefore, by reason of the law and the premises, it is by the Court here ordered, adjudged and decreed that all the interest of said defendant in

and to the Certificate of Purchase No. 11,487 above described, and all the right, title and interest, in and to the lands therein and hereinbefore described be foreclosed and forever canceled, and henceforth rendered null [52] and void and of no force, validity or effect whatever; and that all persons claiming under the said defendant subsequent to the execution of said Certificate of Purchase, either as purchaser, encumbrancer, or otherwise, having liens upon said lands be forever barred and foreclosed of all right, claim or equity of redemption in and to said Certificate of Purchase of the above-described land, and every part thereof, from and after filing a certified copy of this decree in the office of the Register of the State Land Office, and another certified copy in the Recorder's Office of the County of Kern, State of California, and that said certified copies be filed in said Register's and Recorder's office within twenty days from the date of entry of this decree.

It is further ordered that plaintiffs do have and recover of and from said defendant the sum of \$66.25 expenses and costs of this action, and that execution may issue therefor against said defendant.

And it is further ordered, adjudged and decreed that if there be not sufficient property belonging to defendant found to satisfy the same, and said execution be returned not satisfied, then said costs, all amounting to \$66.25, be paid from the twenty per cent of the principal of the purchase money or from the interest paid by the purchaser at the time of the original location and entry of said land.

Done in open court this 27th day of December,  
A. D. 1892.

A. R. CONKLIN,  
Judge.

[Endorsed]: Filed this 27th day of December, A.  
D. 1892. N. R. Packard, Clerk. By H. L. Packard,  
Deputy Clerk. [53]

**Exhibit "I" [to Complaint].**

**NOTICE OF MOTION TO SET ASIDE JUDG-  
MENT.**

(Title of Court and Cause.)

To the said Plaintiff and to J. W. Ahern, Esq., Dis-  
trict Attorney of said County of Kern, and  
Attorney for Plaintiff:

Please take notice, that, upon the judgment-roll,  
pleadings, papers and records of said Court in said  
cause, and upon the annexed affidavit of Fred W.  
Lake, a copy of which is herewith served upon you,  
on the 24th day of December, 1900, at 10 o'clock A.  
M., or as soon thereafter as counsel can be heard, at  
the courtroom of said Superior Court, in the City  
of Bakersfield, in said County of Kern, Fred W.  
Lake, as assignee by mesne transfers and convey-  
ances of S. Davis, the defendant herein, who appears  
specially for the purpose of this motion only, will  
move said Court to set aside, vacate and annul the  
judgment heretofore made and entered herein on the  
27th day of December, 1892, and to quash the pre-  
tended service of summons herein, upon the follow-  
ing grounds, to wit:

That said pretended judgment made and entered  
herein is null and void; that it was and is void upon

its face; that it was made and entered without authority of law for the reason that said Superior Court never acquired jurisdiction over the person of said defendant, or to render said or any judgment against him in the premises; that no service of summons issued in said action, either actual or constructive, was ever made upon said defendant; that the order for publication of summons made and filed herein, and the affidavit therefor, do not nor does either of them, comply with the provisions of the laws of the State and the same were and are fatally defective and absolutely void and said order was made without authority of law; and that all the proceedings had and taken herein as against said [54] defendant since the issuance of said summons, were and are null and void and of no legal or other force or effect whatever.

Dated December 14, 1900.

F. D. BRANDON and  
E. ROUSSEAU,

Attorneys for said Fred W. Lake. [55]

**Exhibit "J" [to Complaint—Affidavit of Fred W.  
Lake].**

**AFFIDAVIT OF FRED W. LAKE.**

(Title of Court and Cause.)

State of California,

City and County of San Francisco,—ss.

Fred W. Lake, being duly sworn, deposes and says: That he is and was at all times herein mentioned a resident of the State of California, a citizen of the United States, and of lawful age; that on or about the 20th day of March, 1890, said defendant

S. Davis, for a valuable consideration assigned, sold and transferred the Certificate of Purchase issued to him for the lands and premises mentioned and described in the complaint herein, as therein set forth, with all his right, title and interest thereunder and to said lands and the patent therefor, to one Charles H. Gilman, who thereupon became and was the lawful owner and holder thereof and of all rights therein and thereunder; that thereafter and on the 7th day of December, 1900, said Charles H. Gilman, for a valuable consideration sold, transferred and assigned to this affiant an undivided one-half of said certificate of purchase and all rights thereunder and of said lands and the patent therefor; that at the same time said S. Davis, defendant herein, made and filed with the Surveyor-General of the State of California, his application to purchase said lands (upon which said application said certificate of purchase was thereafter issued), to wit: August 1, 1888, he inserted therein, as a part thereof as required by law, his postoffice address, to wit: Sacramento, Sacramento County, California, where he then resided and ever since has resided; that the directory of residents of said Sacramento, Sacramento County, in this State, published in said county in said year 1888, and every such directory there published annually since contained the name and address of said defendant S. Davis, showing that he resided [56] in Sacramento aforesaid all of said time, and he still resides there; that the delinquent list published as set forth in said complaint was never seen by said S. Davis, nor by said Charles H. Gilman, nor by this

affiant, nor was any copy thereof, or notice of any kind relating to or mentioning said delinquency ever received by said persons or either of them; that the first information relating to said delinquency or to this action or to the default or pretended judgment rendered therein, was communicated to them by this affiant after he had, by mere accident and within six months last past, for the first time discovered that said suit had been instituted and said pretended judgment entered; and that no summons of complaint in said action was ever or at all in any manner served upon said defendant in said action.

FRED W. LAKE.

Subscribed and sworn to before me, this 13th day of December, 1900.

[Seal] F. W. LAWLER,  
Court Commissioner, City and County of San Francisco.

Filed December 14, 1900. I. L. Miller, Clerk.

[57]

**Exhibit "K" [to Complaint—Amended Notice of Motion].**

**AMENDED NOTICE OF MOTION.**

(Title of Court and Cause.)

To said Plaintiff and to J. W. Ahern, Esq., District Attorney of said County of Kern and Attorney for Plaintiff:

Please take notice that the notice herein served on you on the 14th day of December, 1900, notifying you of Motion herein to be heard December 24, 1900, the hearing of which was continued by stipulation to

December 31, 1900, is hereby amended, without waiving any rights under said original notice, to read as follows:

Please take notice, that upon the affidavit of Fred W. Lake, which was heretofore served by copy on you; and upon the affidavits of S. Davis and C. H. Gilman hereto attached; and upon the Judgment-roll, pleadings, papers and records of said Court in said cause; on the 31st day of December, 1900, at 10 o'clock A. M. of that day or as soon thereafter as counsel can be heard, at the courtroom of said Superior Court in the City of Bakersfield, in said County of Kern, Fred W. Lake, as assignee, by mesne transfers and conveyances to said S. Davis, the defendant, who appears specially for the purpose of this motion only, will move this Court to set aside, vacate and annul the Judgment heretofore made, rendered and entered herein on the 27th day of December, 1902, to quash and set aside the summons and all subsequent proceedings in this action, on the grounds that said pretended judgment made, rendered and entered herein, is null and void; that it was and is void upon its face; that it was made and entered without authority of law for the reason that said Superior Court never acquired jurisdiction over the person of said defendant, or to render said or any judgment against him in *in* the premises; that no service of summons, issued in said [58] action, either actual or constructive, was ever made on said defendant; that the affidavit, and the order for publication of summons, made and filed herein do not nor does either of them comply with the laws of the

state and the same were and are fatally defective and absolutely void, and said Order was made without authority of law; and that all the proceedings had and taken herein as against said defendant, were and are null and void, and of no legal or other force or effect whatever; with costs, and for such other and further relief as to the Court may seem just.

Dated December 24, 1900.

F. D. BRANDON and  
E. ROUSSEAU,

Attorneys for said Fred W. Lake. [59]

**Exhibit "L" [to Complaint—Affidavit of Charles H. Gilman].**

**AFFIDAVIT OF CHARLES H. GILMAN.**

(Title of Court and Cause.)

State of California,

County of Sacramento,—ss.

Charles H. Gilman, being duly sworn, deposes and says: That he is and was at all times herein mentioned a resident of the State of California, a citizen of the United States, and of lawful age; that on or about the 20th day of March, 1890, said defendant S. Davis, for a valuable consideration assigned, sold and transferred the certificate of purchase issued to him for the lands and premises mentioned and described in the complaint herein, and therein set forth, with all his right, title and interest thereunder and to said land, and the patent to be issued therefor, to this affiant, who thereupon became and was the lawful owner and holder thereof and of all rights therein and thereunder; that at said time and ever

since and up to the present time said affiant was and still is a resident of said Sacramento, Sacramento County, of said State of California, and during all of said time his name and address in Sacramento aforesaid has appeared in the Directory of residents of said Sacramento, published in Sacramento County, aforesaid; that affiant was not in any manner made a party to the above-entitled action; that the delinquent list, as set forth in said complaint was never seen by said affiant nor was any copy thereof or notice of any kind relating thereto received by said affiant; that the first information relating to said delinquency or to this action or to the default and pretended judgment rendered therein was communicated to this affiant within three months last past by one Fred W. Lake; and that no summons or complaint in said action was ever or at all in any manner served on this affiant; [60] that at all times herein mentioned and ever since on or about the first day of August, 1888, said affiant has been acquainted with and known S. Davis, the defendant herein above named; that, during all of said period, said defendant was a resident and had his home in Sacramento aforesaid, and that to the best of affiant's knowledge and belief, his name and address in Sacramento aforesaid appeared in the Directory of residents of said Sacramento, Sacramento County, State of California, annually published in said county of Sacramento.

CHARLES H. GILMAN.

Subscribed and sworn to before me, this —— day of December, A. D. 1900.

[Seal]

H. M. LA RUE, Jr.,

Notary Public in and for Sacramento County, State of California. [61]

**Exhibit "M" [to Complaint—Affidavit of S. Davis].**

**AFFIDAVIT OF S. DAVIS.**

(Title of Court and Cause.)

State of California,

County of Sacramento,—ss.

S. Davis, being duly sworn, deposes and says: That he is the person named as defendant in above-entitled action and the same person to whom on March 20, 1889, was issued the Certificate of Purchase for the lands and premises mentioned and described in the complaint herein, as therein set forth; that on or about March 20, 1890, affiant, for a valuable consideration, assigned, sold and transferred the said Certificate of Purchase with all his right, title and interest thereunder and to said lands and the patent to be issued therefor, to one Charles H. Gilman, who thereupon became and was the lawful owner and holder thereof and of all rights therein and thereunder; that at the time affiant made and filed with the Surveyor-General of the State of California his application to purchase said lands (upon which said application said Certificate of Purchase was thereafter issued) to wit: August 1, 1888, he inserted therein as a part thereof as required by law, his postoffice address, to wit: Sacramento, Sacramento County, California, where he then resided and ever since has resided; that the directory of residents of

said Sacramento aforesaid, published in said county in said year 1888, and every such directory there published annually since, contained the name and address of said affiant showing his place of residence in Sacramento aforesaid all of said time, and he still resides there; that the delinquent list, published as set forth in said complaint was never seen by said affiant, nor was any copy thereof, or notice of any kind relating thereto, ever received by said affiant; that the first information relating to [62] said delinquency or to this action, or to the default and pretended judgment rendered therein, was communicated to this affiant within three months last past through one Fred W. Lake; and that no Summons or Complaint in said action was ever or at all in any manner served upon this affiant.

S. DAVIS.

Subscribed and sworn to before me, this — day of December, A. D. 1900.

[Seal] H. M. LA RUE, Jr.,  
Notary Public in and for Sacramento County, State  
of California.

Filed December 28, 1900. I. M. Miller, Clerk.  
By Bedell Smith, Deputy Clerk. [63]

**Exhibit "N" [to Complaint—Order Vacating  
Judgment].**

**ORDER VACATING JUDGMENT.**

(Title of Court and Cause.)

The motion of Fred W. Lake, as successor in interest of defendant above-named, for an order of this Court setting aside, vacating and annulling the Judgment heretofore made, rendered, and entered

herein on the 27th day of December, 1892, and to quash and set aside the pretended service of summons in this action on the grounds that no service of summons in said action actual or constructive, was ever made, and that said Judgment is and was at all times void, and void upon the face thereof, coming up regularly to be heard on the 31st day of December, 1900, the moving party being present by F. D. Brandon and E. Rousseau, his attorneys, and the plaintiff being present by J. W. Ahern, District Attorney for said County of Kern and attorney for plaintiff herein, and it appearing that Notice of said Motion, and the papers and affidavits filed therewith were duly and regularly served upon plaintiff's attorney herein, and that both parties consented to a hearing upon the same on this day.

Thereupon the Court proceeded to hear said Motion upon the judgment-roll in said action consisting of the Complaint herein with entry of default thereon, the Summons issued in said action, and the decree entered therein, and upon the affidavit for publication of summons, and the order of the Court therefor, and also upon the notices, original and amended, and affidavits of Fred W. Lake, C. H. Gilman and S. Davis, defendant named, all of which papers above-mentioned were introduced and read without objection, and it appearing to the Court from said judgment-roll and the affidavits and other papers above-mentioned that said motion now presented should be granted.

It is ordered that said Judgment herein heretofore made and entered on the 27th day of December, 1892,

be and the same [64] is hereby annulled, vacated and set aside, and that the service of summons upon said defendant S. Davis, and the default entered in pursuance thereof, be and the same are hereby quashed, vacated and set aside.

Done in open court this 31st day of December, 1900.

J. W. MAHON,  
Judge.

[Endorsed]: Filed Dec. 31, 1900. I. L. Miller, Clerk. By Bedell Smith, Deputy Clerk. [65]

**Exhibit "O" [to Complaint—Notice of Motion to Vacate Order Setting Aside Default, etc.]**

(Title of Court and Cause.)

To the Above-named Defendants and Messrs. F. D. Brandon and E. Rousseau, His Attorneys:

You and each of you will please take notice that on Tuesday, the 29th day of October, 1901, at ten o'clock A. M. of that day, or as soon thereafter as counsel can be heard at the courtroom of the Superior Court of the County of Kern, State of California, in the courthouse of the City of Bakersfield, in said county, the above-named plaintiff will move the Court to vacate and set aside an order of said Court made and entered in the above-entitled cause on the 31st day of December, 1900, setting aside the default of the defendant herein and vacating and setting aside the Judgment entered in this cause on the 27th day of December, 1892, upon the following grounds:

First—That said Superior Court had no jurisdiction to make or enter an order setting aside the default of said defendant in the premises.

Second—That said Court had no jurisdiction to make an order setting aside or vacating the judgment in said cause.

Third—That said order setting aside said default of said defendant in this cause is null and void and was made without authority of law.

Fourth—That said order vacating and setting aside the Judgment entered in said cause is void and was made without authority of law.

Said Motion will be made and based upon the pleadings, papers, records and Judgment-roll in said cause.

Dated, October 17, 1901.

J. W. AHERN,

District Attorney of the County of Kern, State of California, and Attorney for Plaintiff in the Above-entitled Cause. [66]

[Endorsed]: Filed Oct. 21, 1901. I. L. Miller, Clerk. By Bedell Smith, Deputy Clerk. [67]

**Exhibit "P" [to Complaint—Order Vacating Order Setting Aside Judgment].**

**ORDER VACATING ORDER SETTING ASIDE JUDGMENT.**

(Title of Court and Cause.)

The motion of the plaintiff in the above-entitled cause for an order of this Court vacating and setting aside an Order of this Court made and entered in this Court on the 31st day of December, 1900, purporting to set aside the default of the above-named defendant S. Davis, herein, and purporting to set aside the judgment made and entered in this cause on the 27th day of December, 1892, in favor

of said plaintiff and against said defendant, S. Davis, on the ground that this Court had no jurisdiction to make or enter an order setting aside the default of said defendant herein, or said Judgment, and that said several orders were and are null and void, came on regularly to be heard on the 29th day of October, 1901, and the Court having heard the motion and the evidence offered in support thereof consisting of the Judgment-roll and records of this cause, and the Court having heard the arguments of counsel for and against the granting of said motion and the motion having been submitted to the Court for consideration and decision, and the Court being sufficiently advised in the premises, doth order that said motion be granted.

It is therefore ordered, adjudged and decreed that the orders of this Court heretofore made and entered in this cause on the 31st day of December, 1900, purporting to set aside the default of above-named defendant, S. Davis, entered herein, and purporting to vacate and set aside the judgment made and entered in this cause on the 27th day of December, 1892, in favor of plaintiff and against said defendant S. Davis, be and the same are hereby vacated, set aside and annulled, and said judgment is hereby adjudged and decreed to be in full force and effect.

[68]

Done in open court this 11th day of December, 1901.

J. W. MAHON,  
Judge.

[Endorsed]: Filed November 22, 1901. I. L. Miller, Clerk. By Bedell Smith, Deputy Clerk. [69]

**Exhibit "Q" [to Complaint—Complaint in Moran vs. Bonynge et al].**

*In the Superior Court of the County of Kern, State of California.*

THOMAS L. MORAN,  
vs.  
Plaintiff,

MARY A. BONYNGE, JOHN DOE and RICHARD ROE,  
Defendants.

Plaintiff complains of defendants and for cause of action alleges:

**I.**

That plaintiff is ignorant of the true names of the two defendants last above mentioned, and for that reason has sued them herein under the fictitious names of John Doe and Richard Roe; and plaintiff asks that when their true names are ascertained the same may be inserted herein in lieu of said fictitious names.

**II.**

That the following described land situated in the County of Kern, State of California, to wit: the South half (1/2) of Section 36, Township 12 North, Range 24 West, San Bernardino Base and Meridian, is now and for more than one year last past has been the property of the said State of California, and subject to sale by said State under the provisions of Title VIII of the Political Code of said State; that all of said land is now and for more than one year last past has been suitable for cultivation; that said land is now and for more than ten years

last past has been surveyed and sectionized by the Government of the United States, and the plat of said township showing such [70] survey and sectionization was filed in the United States Land Office at San Francisco, California, more than ten years ago; that said township plat was approved by the Surveyor-General of the State of California, and the United States Surveyor-General for the State of California more than ten years ago.

### III.

That on or about the 22d day of July, 1899, the above-named defendant, Mary A. Bonynge, filed in the office of the Surveyor-General of the State of California, her affidavit and application Number 6749 to purchase the above-described land from said State under the provisions of Title VIII of the Political Code of said State, in which said affidavit and application said defendant, Mary A. Bonynge, set forth among other things that said land was not suitable for cultivation; that after said defendant, Mary A. Bonynge, had filed her affidavit and application to purchase said land from said State, the same was approved by said State Surveyor-General; that said defendant, Mary A. Bonynge, is not now and never has been an actual settler or settler at all upon said land or any part thereof.

### IV.

That plaintiff is now and for more than twenty-one years last past has been a resident of the State of California; that plaintiff is a naturalized citizen of the United States over the age of twenty-four years; that plaintiff is now and ever since the 14th

day of March, 1900, has been an actual settler upon said South one-half ( $\frac{1}{2}$ ) of Section 36, Township 12 North, of Range 24 West, San Bernardino Base and Meridian; that after this plaintiff became an actual settler upon said land and he being desirous of purchasing the same from said State, under the provisions of Title VIII of the Political Code of said State, he did, at the City of Bakersfield, County of Kern, State of California, [71] make and execute in writing his affidavit and application to the Surveyor-General of said State, to purchase said land from said State under the provisions of Title VIII of the Political Code of said State; that said affidavit and application of plaintiff's was made, subscribed and sworn to by him on the 16th day of March, 1900, in the said City of Bakersfield, before R. McDonald, a Notary Public in and for the County of Kern, State of California; that said affidavit and application of plaintiff to purchase said lands was and is in the words and figures following, to wit:

APPLICATION TO PURCHASE STATE LANDS.

Location No. 6830. . . . . Land District.

State of California,

County of Kern.

To the Surveyor-General, Sacramento:

I, Thomas L. Moran, of Bakersfield, Kern County, do hereby apply to purchase the land hereinafter described, and in support of my application I do solemnly swear that I am a naturalized citizen of the United States, a resident of this State, of lawful age. That I desire to purchase from the State of California, under provisions of Title Eight of the

Political Code, the following described land in Kern County, to wit: The South one-half ( $\frac{1}{2}$ ) of Section thirty-six (36) in Township twelve (12) North of Range twenty-four (24) West, San Bernardino Base and Meridian; containing three hundred and twenty acres.

That there is no occupation of said land adverse to any that I have.

(a) That I desire to purchase the same for my own use and benefit, and for the use and benefit of no other person or persons whomsoever, and that I have made no contract or agreement to sell the same.  
(b) That I am an actual settler thereon. [72]  
That said land is suitable for cultivation; that I have not entered any portion of any lands mentioned in Section Three Thousand Four Hundred and Ninety-four of the Political Code (to wit, the unsold portion of the five hundred thousand acres granted to the State for school purposes, the sixteenth and thirty-sixth sections, and the lands selected in lieu thereof; which, together with that now sought to be purchased, exceeds (c) three hundred and twenty (320) acres; and that said lands is not timbered land.

Subscribed and sworn to before me, this 16th day of March, 1900.

[Seal]

THOMAS L. MORAN,

Postoffice Address: Bakersfield, Kern County.

[Seal]

R. McDONALD,

Notary Public.

V.

That all the facts stated in plaintiff's said affidavit

and application to purchase said land were true at the time said affidavit and publication were made and ever since have been and are now true.

## VI.

That on the 24th day of March, 1900, plaintiff filed at the office of the State Surveyor-General of California, his said affidavit and application to purchase said land and the same remains on file and pending in said office; that at the time plaintiff filed his said affidavit and application in said office he paid said Surveyor-General his fee of five dollars (\$5.00) for filing the same; that at the time plaintiff filed his said affidavit and application aforesaid, he also filed in the office of the said Surveyor-General his written and verified [73] protest against the issuance of any evidence of title in or to said land to said defendant Mary A. Bonynge, and plaintiff at the same time in writing demanded of said Surveyor-General that the contest between plaintiff and said defendant Mary A. Bonynge, as to the right to purchase said land from said State be referred to the Superior Court of the County of Kern, State of California, for trial and determination, as required by the provisions of Section 3414 of the Political Code of said State; that said Surveyor-General refused and still refuses to approve plaintiff's said application to purchase said land by reason of the approval of said application of said defendant, Mary A. Bonynge, as aforesaid.

## VII.

Plaintiff alleges upon his information and belief that on or about the 23d day of January, 1900, the

Register of the State Land Office of said State, issued to and in the name of said defendant, Mary A. Bonynge, a Certificate of Purchase, Number 14,734, for said land, based upon said defendant, Mary A. Bonynge's said application to purchase said land, and the approval thereof by said Surveyor-General, as aforesaid.

### VIII.

That by reason of the conflicting applications of the defendant, Mary A. Bonynge, and this plaintiff to purchase said land, a contest arose in the office of the Surveyor-General of said State as to the approval by said Surveyor-General of said application of said defendant, Mary A. Bonynge, and as to the right of said defendant, Mary A. Bonynge, and this plaintiff to purchase said land and in the office of the Register of the Land Office of said State, concerning said certificate of purchase issued to said defendant, Mary A. Bonynge, as aforesaid. [74]

### IX.

That on the 6th day of June, 1900, in pursuance of plaintiff's demand for trial of the contest between plaintiff and said defendant, Mary A. Bonynge, as to the right to purchase said land, said Surveyor-General, as such and as ex-officio, a Register of the Land Office of said State, made an order referring said contest to the Superior Court of the County of Kern, State of California, for trial and determination; and on said last-mentioned day, said Surveyor-General, as such and as Register of the State Land Office of said State, duly entered said order in the proper Record Book of his office, pursuant to the provisions of Section 3414 of the Political Code of

said State, a certified copy of which order was duly filed in the office of the Clerk of the Superior Court of the County of Kern, State of California, on the 9th day of July, 1900; and plaintiff hereby makes profert thereof that sixty days have not expired since the making of said order of reference.

## X.

That the said land, and the whole thereof, has been listed to the State of California, by the Government of the United States.

## XI.

That plaintiff is informed and believes and therefore alleges that said defendants, John Doe and Richard Roe, have or claim to have some interest in said land above described, as assignees of said certificate of purchase issued to said defendant, Mary A. Bonynge, as aforesaid.

Wherefore, plaintiff prays judgment:

### 1.

That the application of the defendant, Mary A. Bonynge, No. 6749, to purchase from the State of California, the South [75] one-half (1/2) of Section 36, Township 12 North, Range 24 West, .... San Bernardino Base and Meridian: and that the approval *thereof* the said Surveyor-General was and is illegal and void; and that the said application of the defendant, Mary A. Banyngo, *purchase* said land, be declared null, void and cancelled.

### 2.

That the Certificate of Purchase No. 14,734, issued to said defendant, Mary A. Bonynge, for said land by the Register of the State Land Office on the 23d

day of January, 1900, be declared illegal, null, void and cancelled.

3.

That it may be adjudged that the defendant, Mary A. Bonynge, is not entitled, and never has been entitled, to purchase said land or any part thereof from said State.

4.

That the claims of the defendants, John Doe and Richard Roe, to said land or any part thereof, as assignees of said certificate of purchase, issued to said Mary A. Bonynge, be declared null, void and of no effect or force; that it be adjudged that none of said defendants are entitled to purchase said land from said State.

5.

That the application, No. 6830, of the plaintiff to purchase the South one-half ( $\frac{1}{2}$ ) of Section 36, Township 12 North of Range 24 West, San Bernardino Base and Meridian, which application was filed in the office of the State Surveyor-General of the State of California, on the 24th day of March, 1900, be adjudged a good, legal and valid application to purchase said land, and that the State Surveyor-General of said State be ordered to approve same.

6.

That it be adjudged that the plaintiff is entitled to purchase [76] said South one-half of Section 36, Township 12 North of Range 24 West, San Bernardino Base and Meridian from said State; and to have a certificate of purchase therefor upon his making his final payment for said land as required by law;

and that plaintiff have judgment against said defendants for his costs, and such other and further relief in the premises as may be proper.

(Signed) J. R. DORSEY,  
Attorney for Plaintiff.

State of California,  
County of Kern,—ss.

Thomas L. Moran, being first duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on his information or belief, and as to those matters, he believes it to be true.

(Signed) THOMAS L. MORAN.

Subscribed and sworn to before me, this 25th day of July, 1900.

J. W. AHERN,  
District Attorney of the County of Kern, State of California.

By J. R. DORSEY,  
Deputy District Attorney.

[Endorsed]: Filed July 25, 1900. I. L. Miller,  
Clerk. [77]

**Exhibit "R" [to Complaint—Order Granting Motion to File Complaint in Intervention].**

MINUTE ORDER.

Monday, December 31, 1900.

Court met at 10 o'clock A. M. Present, Hon. J. W. MAHON, Judge.

(Title of Court and Cause.)

In this case the motion of intervenors to file com-

plaint in intervention, came on regularly to be heard to-day, F. D. Brandon and E. Rousseau, appearing as attorneys for intervenors, and there being no appearance on the part of plaintiff or defendants.

All the records, papers in the case and affidavits introduced in evidence on the part of intervenors. On motion of counsel for intervenors, it is by the Court ordered that the motion to file complaint in intervention, in the above-entitled action be, and the same is hereby granted, and that Charles H. Gilman, H. H. Snow and Fred W. Lake, intervenors, be granted leave to file complaint in intervention in the above-entitled case. [78]

**Exhibit "S" [to Complaint—Amended Complaint of Intervention].**

*In the Superior Court of the County of Kern, State of California.*

THOMAS L. MORAN,

Plaintiff,

vs.

MARY A. BONYNGE et al.,

Defendants.

CHARLES H. GILMAN, H. H. SNOW and FRED W. LAKE,

Intervenors.

Come now the intervenors above-named and by leave of the Court first had and obtained file this their Amended Complaint of intervention herein, and for cause of action allege and show:

1. That on or about the 1st day of August, 1888, the State of California was the owner of that certain piece or parcel of land situate and being in the

County of Kern, State of California, described as follows, to wit:

All of Section thirty-six (36), in Township twelve (12) North, Range twenty-four (24) West, San Bernardino Meridian, containing 640 acres of land.

2. That on or about said 1st day of August, 1888, one S. Davis made application in due form to purchase from the State of California the land and premises above described, and then paid to the State of California twenty (20) per cent of the purchase price of said lands and the first year's interest in advance upon the balance of said purchase money, together with the deposit and filing fee as required by law, and thereafter received from the State of California a Certificate of Purchase in due form for said lands, dated the 20th day of March, 1889, and number 11487, whereby said S. Davis became the purchaser and [79] entitled to the possession of said land and to receive a patent therefor in due course.

3. That thereafter and on or about the 20th day of March, 1890, said S. Davis for a valuable consideration, sold, transferred and assigned said Certificate of Purchase and all his right, title and interest thereunder and to said lands and the patent therefor, to said Intervenor Charles H. Gilman, who thereupon became the lawful holder and owner thereof and of all rights therein and thereunder; that thereafter and on the 7th day of December, 1900, said Charles H. Gilman for a valuable consideration sold, transferred and assigned to said Intervenor H. H. Snow an undivided one-fourth, and

to said Intervenor Fred W. Lake an undivided one-half, of said Certificate of Purchase and all his right, title and interest thereunder, and to said land and premises and the patent therefor; and that ever since said December 7th, 1900, said intervenors have been and now are the lawful owners, in undivided proportions as above set forth, to wit: said Charles H. Gilman one-fourth, said H. H. Snow one-fourth, and said Fred W. Lake one-half of said Certificate of Purchase and of said lands and premises, and entitled to receive said patent therefor in due course conveying to them the fee simple thereof in the proportions as above set forth.

4. That on or about the 25th day of August, 1892, in the Superior Court of the County of Kern aforesaid an action was commenced in the name of the People of the State of California against said S. Davis; that neither nor any of said Intervenors was in any manner made a party defendant or named or described in the Complaint or Summons in said action; and that the said Court did not in any manner obtain jurisdiction to render a valid or any judgment against said S. Davis, or either or any of the Intervenors herein, foreclosing or in any way impairing or [80] affecting the interest of these intervenors or any or either of them in or to said lands and premises.

5. That the defendant Mary A. Bonynge above-named claims to own the said land under and by virtue of a certain Certificate of Purchase of date January 23d, 1900, and numbered 14734, issued to her in pursuance of her application to purchase the

said land dated July 22d, 1899, and numbered 6749; but these intervenors say that said Certificate of Purchase was unlawfully and improvidently issued to said defendant, and constitutes a cloud upon the title of these intervenors and each of them in and to the said lands and premises.

6. That the plaintiff hereinabove named claims to own and to be entitled to purchase the south half of said section of land described, under and by virtue of an application to purchase the same filed with the Surveyor General of the State of California March 24th, 1900, in connection with which said plaintiff claims that said land is suitable for cultivation, and that he is and ever since March 14th, 1900, has been an actual settler thereon; but these intervenors aver, upon their information and belief, that said plaintiff is not and never has been an actual settler thereon; and that his application to purchase the south half of said section of land was unlawfully and improvidently received and filed, and constitutes a cloud upon the title of these intervenors and each of them in and to said south half of said section of land.

7. That at the time of the issuance of said certificate of purchase to said defendant Mary A. Bonynge as aforesaid, and at all times since including the time of the application to purchase the south half of said land by said plaintiff Thomas L. [81] Moran as aforesaid, the said Certificate of Purchase issued to said S. Davis, and thereafter assigned as aforesaid to these intervenors, had not and has not been cancelled by any valid judgment, and the interest and estate thereunder of these interven-

ors and each of them in and to said lands and premises had not and has not been foreclosed or destroyed.

8. That the claims of said defendant Mary A. Bonynge and said plaintiff Thomas L. Moran are and each of them is without any right whatever, and that they have not nor have either of them any right, title, estate or interest in or to said lands and premises or any part thereof.

WHEREFORE these intervenors pray judgment: That all adverse claims of the plaintiff and defendant herein to the above-mentioned lands and premises be determined by a Decree of this Court; that by said Decree it be adjudged that the judgment in said action by the People of the State of California against said S. Davis is null and void and particularly so as to these Intervenors and each of them that no rights whatever accrued to said plaintiff by reason of his application to purchase the south half of said lands filed as aforesaid with said Surveyor General on March 24th, 1900, and that the said Certificate of Purchase issued to said defendant on January 23d, 1900, as aforesaid, be set aside and cancelled; that the plaintiff and the defendant and each of them be forever debarred from asserting any claim whatsoever in or to the said lands and premises or any part thereof adverse to these intervenors or either of them, and that these intervenors have such other and further relief as to the Court shall seem meet, with their costs.

F. D. BRANDON and  
E. ROUSSEAU,

Attorneys for Intervenors. [82]

State of California,  
County of Kern,—ss.

Fred W. Lake having been duly sworn, says: That he is one of the intervenors in the above-entitled action; that he has read the foregoing Amended Complaint in Intervention and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true.

FRED W. LAKE.

Subscribed and sworn to before me, this 31st day of December, 1900.

[Seal]

E. ROUSSEAU,  
Notary Public. [83]

**Exhibit "T" [to Complaint—Answer of Mary A. Bonynge].**

**ANSWER OF DEFENDANT, MARY A.  
BONYNGE.**

(Title of Court and Cause.)

Comes now Mary A. Bonynge, one of the defendants herein, and answering unto plaintiff's complaint, admits, denies and alleges as follows, to wit:

**I.**

Admits that the South half of Section 36, Township 12 North, Range 24 West, San Bernardino Meridian, situated in the County of Kern, State of California, was at the date of filing of plaintiff's complaint, to wit, July 25, 1900, and for more than one year prior thereto had been the property of the State of California. Denies that at any time subse-

quent to the 20th day of December, 1899, said described land or any portion thereof was, or is now subject to sale by said State under or by the provisions of Title VIII of the Political Code of the State of California. Denies that all or any portion of said land is now or ever has been suitable for cultivation. Admits that said land is now, and for more than ten years last past has been, surveyed and sectionized by the Government of the United States. Admits that the plat of said township showing such survey and sectionization was filed in the United States Land Office at San Francisco, California, more than ten years ago. Admits that said township plat was approved by the Surveyor-General of the State of California, and the United States Surveyor General for the State of California more than ten years ago.

## II.

Admits that on the 22d day of July, 1899, this defendant filed in the office of the Surveyor-General of the State of California, her affidavit and application No. 6749 to purchase [84] the above-described land from said State under the provisions of Title VIII of the Political Code of said State. Admits that in said affidavit and application this defendant set forth among other things that said land was not suitable for cultivation. Admits that after this defendant had filed her said affidavit and application to purchase said land from said State, the same was approved by said State Surveyor-General. Denies that this defendant is not now or never has been an actual settler or settler at all upon said land or any part thereof.

### III.

That this defendant has no information or belief sufficient to enable her to answer, and basing her denial upon those grounds, denies that plaintiff is now, or for more than twenty-one years last past has been a resident of the State of California, or that plaintiff is a naturalized citizen of the United States.

### IV.

Denies that plaintiff is now, or ever since the 14th day of March, 1900, or at any time, has been or was an actual settler upon said south half of Section 36, Township 12 North, of Range 24 West, San Bernardino Base. Denies that after plaintiff became an actual settler upon said land, he made or executed his affidavit and application, or either, to the Surveyor-General of the State of California, to purchase said land from said State under the provisions of Title VIII of the Political Code of said State. Admits that on or about the 24th day of March, 1900, the plaintiff filed in the office of the State Surveyor-General of the State of California, an affidavit and application to purchase said land from the State corresponding in words and figures to the affidavit and application set forth in paragraph IV of plaintiff's complaint.

### V.

Denies that the following facts or statements contained [85] in plaintiff's said affidavit and application to purchase said lands were true at the time said affidavit and application were made, or at any other time whatsoever, to wit: "That there is

no occupation of said land adverse to any that I have.

"That I desire to purchase the same for my own use and benefit, and for the use and benefit of no other person or persons whomsoever.

"That I am an actual settler thereon.

"That said land is suitable for cultivation."

#### VI.

Defendant alleges that at the time of the making of said affidavit and application to purchase by plaintiff, each and every of the foregoing statements set forth in paragraph V thereof were in truth and in fact false as the plaintiff herein well knew.

#### VII.

That this defendant has no information or belief sufficient to enable her to answer the allegations contained in paragraph VI of plaintiff's complaint, and basing her denial upon those grounds denies each and every of the allegations therein contained.

#### VIII.

Admits each and every of the allegations contained in paragraph VII of plaintiff's complaint.

#### IX.

That this defendant has no information or belief sufficient to enable her to answer the allegations contained in paragraph VIII of said complaint, and basing her denial upon those grounds denies each and every of the allegations contained therein.

[86]

#### X.

Admits the allegations contained in Paragraphs IX and X of plaintiff's complaint.

**XI.**

Denies that the other defendants in this action have or claim some interest in the land mentioned and described in plaintiff's complaint as assignees of said certificate of purchase issued to this defendant as aforesaid.

Wherefore defendant prays judgment:

1. That it may be adjudged and decreed that the plaintiff Thomas L. Moran is not entitled and never has been entitled to purchase said land or any part thereof from the State of California.
2. That the application No. 6830 of the plaintiff to purchase from the State of California the south one-half of Section 36, Township 12 North, of Range 24 West, San Bernardino Meridian, which application was filed in the office of the State Surveyor General of the State of California, on the 24th day of March, 1900, was, and is illegal and void; and that the said application to purchase said land be declared null, void and cancelled.
3. That it be adjudged and decreed that the defendant was and is entitled to purchase said south one-half of Section 36, Township 12 North, of Range 24 West, San Bernardino Meridian, from said State; and that the approval of said application to purchase of this defendant by the said Surveyor-General was and is legal and valid.
4. That the certificate of purchase No. 14,734, issued to this defendant for said land by the Register of the State Land Office, on the 23d day of January, 1900, be declared legal and valid.
5. That the defendant have judgment against

plaintiff for her costs and for general relief.

(Signed) GEO. E. WHITAKER,  
Attorney for Defendant. [87]

State of California,  
County of Kern,—ss.

Geo. E. Whitaker, being first sworn, deposes and says: That he is the attorney for Mary A. Bonynge, one of the defendants herein; that said Mary A. Bonynge is a resident of the County of Los Angeles; that affiant has his office and residence in the city of Bakersfield, county of Kern, and therefore makes this affidavit on behalf of said defendant; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he verily believes it to be true.

(Signed) GEO. E. WHITAKER.

Subscribed and sworn to before me this 27th day of July, 1907.

GEORGE FLOURNOY,

Notary Public in and for Kern County, State of California.

[Endorsed]: Filed July 27, 1907. I. L. Miller, Clerk. By Bedell Smith, Deputy Clerk. [88]

**Exhibit "U" [to Complaint—Second Amended  
Complaint of Intervention].**

**SECOND AMENDED COMPLAINT IN INTER-  
VENTION OF CHARLES H. GILMAN, H. H.  
SNOW AND FRED W. LAKE, INTER-  
VENORS.**

(Title of Court and Cause.)

Come now the intervenors above-named and file

this their Second Amended Complaint of Intervention herein and for cause of action and intervention allege and show:

1. That on or about the 1st day of August, 1888, the State of California was the owner of that certain piece or parcel of land situate and being in the County of Kern, State of California, described as follows, to wit: All of Section thirty-six (36) in Township twelve (12) North, Range Twenty-four (24) West, San Bernardino Meridian, containing 640 acres of land.

2. That on or about the 1st day of August, 1888, one S. Davis made application in due form to purchase from the State of California the land and premises above described, and then paid to the State of California twenty (20) per cent of the purchase price of said lands and the first year's interest in advance upon the balance of said purchase money, together with the deposit and filing fee as required by law, and thereafter received from the State of California a Certificate of Purchase in due form for said lands, dated on the 20th day of March, 1889, and numbered 11,487 whereby said S. Davis became the purchaser and entitled to the possession of said land and to receive a patent therefor in due course.

3. That thereafter and on or about the 20th day of March, 1890, said S. Davis for a valuable consideration, sold, transferred and assigned said Certificate of Purchase and all his right, title and interest thereunder and to said lands and the patent therefor, to said intervenor Charles H. Gilman, who thereupon became the lawful holder and owner thereof

and of all rights [89] therein and thereunder; that thereafter and on the 7th day of December, 1900, said Charles H. Gilman, for a valuable consideration sold, transferred and assigned to said intervenor H. H. Snow an undivided one-fourth, and to said intervenor Fred W. Lake an undivided one-half, of said Certificate of Purchase, and all his right, title and interest thereunder, and to said lands and premises and the patent therefor; and that ever since said December 7th, 1900, said intervenors have been and now are the lawful owners, in undivided proportions as above set forth of said Certificate of Purchase and of said lands and became and are still entitled to receive said patent therefor in due course conveying to them the fee simple therefor in the proportions as above set forth.

4. That the defendant, Mary A. Bonynge, above-named, claims to own the said land under and by virtue of a certain Certificate of Purchase of date January 23d, 1900, and numbered 14,734, issued to her in pursuance of her application to purchase the said land dated July 22, 1899, and numbered 6749; but these intervenors say, on their information and belief, that she was not qualified or entitled to purchase said or any lands from the State, and that said Certificate of Purchase was unlawfully and improvidently issued to said defendant and constitutes a cloud upon the title of these Intervenors and each of them in and to said lands and premises.

5. That the plaintiff herein above-named claims to own, and to be entitled to purchase the south half

of said section of land described, under and by virtue of an application to purchase the same filed with the Surveyor-General of the State of California, March 24, 1900, in connection with which said plaintiff claims that said land is suitable for cultivation and that he is and ever since March 14, 1900, has been an actual settler [90] thereon; but these intervenors aver, upon their information and belief, that said plaintiff is not and never has been an actual settler thereon, and that his application to purchase said south half of said section of land was unlawfully and improvidently received and filed, and constitute a cloud upon the title of these intervenors and each of them in and to said south half of said section of land.

8. That the claims of said defendant, Mary A. Bonynge, and said plaintiff, Thomas L. Moran, are and each of them is without any right whatever, and that they have not nor have either of them any right, title, estate or interest in or to said lands and premises or any part thereof.

WHEREFORE, these intervenors pray judgment, that all adverse claims of the plaintiff and of the defendant herein to the above-mentioned lands and premises be determined by a decree of this Court, that by said decree it be adjudged that no rights whatever accrued to said plaintiff by reason of his application to purchase the south half of said lands filed as aforesaid with said Surveyor-General, on March 24, 1900, and that the said Certificate of Purchase issued to said defendant on January 23, 1900, as aforesaid, be set aside, and cancelled; that the

plaintiff and the defendant and each of them be forever debarred from asserting any claim whatsoever in or to the said lands and premises or any part thereof adverse to these intervenors or either of them, and that these intervenors have such other and further relief as to the Court shall seem meet, with their costs.

F. D. BRANDON,  
Attorney for Intervenors.

State of California,

City and County of San Francisco,—ss.

Fred W. Lake, having been duly [91] sworn, deposes and says: That he is one of the intervenors above-named in the above-entitled action; that he has read the foregoing Second Amended Complaint in Intervention and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters he believes it to be true.

FRED W. LAKE.

Subscribed and sworn to before me this 27th day of December, 1907.

[Seal] A. J. HENRY,  
Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Second Amended Complaint in Intervention, Filed December 28, 1907. I. L. Miller, Clerk. By Bedell Smith, Deputy Clerk. F. D. Brandon, Attorney for Intervenors. [92]

**Exhibit "V" [to Complaint—Complaint in Lake et al. vs. Bonynge].**

*In the Superior Court of the County of Kern, State of California.*

Department No. 2.

No. 6006.

FRED W. LAKE and H. H. SNOW,

Plaintiffs,

vs.

MARY BONYNGE and JOHN DOE,

Defendants.

**COMPLAINT.**

Plaintiffs complain of defendants and for cause of action allege:

**I.**

That on or about the first day of August, 1888, the State of California was the owner of that piece or parcel of land situate and being in the County of Kern, State of California, described as follows, to wit: All of Section Thirty-six (36) in Township Twelve (12) North, Range Twenty-four (24) West, San Bernardino Meridian, containing 640 acres of land.

**II.**

That on or about the first day of August, 1888, one S. Davis made application in due form to purchase from the State of California the land and premises above described, and then paid to the State of California twenty (20) per cent of the purchase price of said lands and the first year's interest in advance upon the balance of said purchase money, together

with the deposit and filing fees as required by law, and thereafter received from the [93] State of California a Certificate of Purchase in due form for said lands, dated on the 20th day of March, 1889, and number 11,487, whereby said S. Davis became the purchaser and entitled to the possession of said land and to receive a patent therefor in due course.

### III.

That thereafter and on or about the 20th day of March, 1890, said S. Davis for a valuable consideration sold, transferred and assigned said Certificate of Purchase and all his right, title, and interest thereunder and to said lands and the patent therefor, to one Charles Gilman, who thereupon became the lawful holder and owner thereof, and of all rights therein and thereunder; that thereafter and on the 7th day of December, 1900, said Charles H. Gilman, for a valuable consideration sold, transferred and assigned to said plaintiff H. H. Snow an undivided one-fourth, and to said plaintiff Fred W. Lake an undivided one-half of said Certificate of Purchase and all his right, title and interest thereunder, and to said land and premises and to the patent therefor; and that ever since said December 7th, 1900, said plaintiffs have been and now are the lawful owners, in undivided proportions as above set forth, of said Certificate of Purchase and of said land, and became and are still entitled to receive said patent therefor in due course conveying to them the fee simple therefor in the proportion as above set forth.

### IV.

That the defendant Mary A. Bonynge above-

named claims to own the said land under and by virtue of a certain Certificate of Purchase of date January 23d, 1900, and numbered 14,734, issued to her in pursuance of her application to purchase the land dated July 22d, 1889, and numbered 6749; but that these [94] plaintiffs say, on their information and belief, that she was not qualified or entitled to purchase said land or lands from the State, and that said Certificate of Purchase was unlawfully and improvidently issued to said defendant, and constitutes a cloud upon the title to these plaintiffs, and each of them in and to said land and premises.

## V.

That as plaintiffs are informed and believe, and therefore allege, the Certificate of Purchase so issued to S. Davis as aforesaid, and which has been as aforesaid alleged sold, transferred and assigned to these plaintiffs, has never been vacated, annulled or set aside; and that the same ever since has been and now is the only valid and subsisting Certificate of Purchase issued from the State of California and covering the title to said land.

## VI.

That on the 25th day of January, 1909, the State of California issued to the said Mary A. Bonynge upon the Certificate of Purchase so issued to her as aforesaid, a patent for the above-described land; and that said patent was inadvertently issued to the said Mary A. Bonynge and she was not at the time entitled thereto for the reason that the only valid and subsisting Certificate of Purchase covering the title to said land was and is the Certificate of Purchase

so issued to the said S. Davis as aforesaid.

### VII.

That the plaintiffs are informed and believe and therefore allege that the said Mary A. Bonynge prior to the issuance of said patent, paid to the State of California the full sum of the purchase price demanded by the State of California for the issuance on such Certificate of Purchase, to wit, the sum of \$800.00. [95]

### VIII.

That at and prior to the issuance of such patent the plaintiffs herein were the owners, as herein alleged, of an interest in the aforesaid Certificate of Purchase as issued to said S. Davis; and that said certificate was then the only valid and subsisting Certificate of Purchase outstanding covering said land and then was and ever since has been and now is a valid and subsisting contract between the State of California and the holders thereof, entitling the holders thereof, upon compliance with the provisions of law in such cases made and provided and upon the payment of the full sum due to the State of California, thereunder, to wit, the sum of \$800.00, to a patent therefor.

### IX.

That the said Mary A. Bonynge now holds the legal title to the land aforesaid as an involuntary or an implied trustee by reason of the facts aforesaid for these plaintiffs to the extent of their interest as herein alleged; and that she ought to be required to transfer and convey to these plaintiffs their several interests in the proportions herein alleged, by

the decree of this Honorable Court, and the said plaintiffs herein now tender to the said Mary A. Bonynge and offer to pay to her the full amount which she, the said Mary A. Bonynge, may have paid to the State of California for such patent, upon the transfer to them by the said defendant of their several interests in and to said lands and in and to said patent heretofore alleged, and offer equity in the premises.

#### X.

That since the issue of said patent, the said Charles H. Gilman has died, and that no letters of administration have yet been issued on his estate, and the plaintiffs are not advised as to whether the said Charles H. Gilman left a will or whether [96] the same has been probated or who the heirs or devisees or the collateral kindred of said Charles H. Gilman may be.

#### XI.

Plaintiffs are informed and believe, and therefore allege, that since the issue of said patent to her, the said Mary A. Bonynge has transferred and assigned over to the defendant John Doe some right, title and interest in and to the said patent, and in and to the land covered thereby, the extent of which is unknown to the plaintiffs; and that said John Doe took with actual knowledge and notice, and with constructive knowledge and notice, of the facts herein stated, and was not a bona fide purchaser or transferee without notice or for value, and ever since has been and now is a trustee for plaintiffs to the extent of the interest so acquired; that the true name

of said defendant John Doe is unknown to plaintiffs, and he is therefore designated by a fictitious name, and plaintiffs pray leave of the above-entitled court to insert his true name herein when ascertained.

## XII.

That plaintiffs herein have no other plain, speedy or adequate remedy at law in the premises.

Wherefore, plaintiffs pray the judgment and decree of this Court that the said defendants hold the naked legal title to the lands aforesaid in trust for the plaintiffs in the proportions set forth in this complaint, and that they may be required to transfer and convey to plaintiffs their several interest in said patent and in and to said lands, and that the Court fix and ascertain the amount due from plaintiffs to the said defendants, or either of them on payment of which the transfers aforesaid are to be made; that the Court make such decree to protect the heirs, devisees and collateral kindred to [97] said Charles H. Gilman as may be consonant with equity, and for general relief and costs.

COCHRANE & HENSHALL and  
F. D. BRANDON,

Attorneys for Plaintiffs.

State of California,

City and County of San Francisco,—ss.

Fred W. Lake, being duly sworn, deposes and says: That he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated on information or

belief, and as to those matters that he believes it to be true.

FRED W. LAKE.

Subscribed and sworn to before me this 27th day of Feby., 1909.

[Seal]

R. B. TREAT,

Notary Public in and for San Francisco, State of California.

[Endorsed]: Filed March 1, 1909. I. L. Miller,  
Clerk. [98]

**Exhibit "W" [to Complaint—Answer].**  
(Title of Court and Cause.)

**ANSWER.**

Come now the defendants Mary A. Bonynge sued herein under the name of Mary Bonynge, and W. A. Bonynge sued herein under the name of John Doe, and answering unto the complaint of plaintiffs, admit, deny and allege as follows:

**I.**

Admit the allegations contained in paragraph I of said complaint.

**II.**

Admit that on or about the 1st day of August, 1888, one S. Davis made application to purchase from the State of California the land and premises described in paragraph I of said complaint and then paid to the State of California twenty per cent of the purchase price of said land and the first year's interest in advance upon the balance of said purchase money, together with the deposit and filing fees as required by law, and thereafter received a certificate of purchase for said land, dated on the

20th day of March, 1889, and numbered 11,487, but deny that the said Davis thereby became the purchaser or entitled to the possession of said land, or to receive a patent therefor in due course.

### III.

That these defendants have no information or belief upon the subject sufficient to enable them to answer a portion of the allegations contained in paragraph III of said complaint, and placing their denial upon those grounds deny that thereafter, and on or about the 20th day of March, 1890, or at any other time, or at all the said S. Davis for a valuable, or any consideration sold, or assigned, or transferred said certificate [99] of purchase and (or) all or any of his right, or title, or interest thereunder, and (or) to said land, and (or) the patent therefor to one Charles Gilman who thereupon became the lawful holder or owner thereof, and (or) of all rights therein, and (or) thereunder, or that thereafter and on the 7th day of December, 1900, the said Charles H. Gilman for a valuable consideration sold, or transferred, or assigned to the plaintiff, H. H. Snow, an undivided one-fourth, and (or) to the plaintiff Fred W. Lake, an undivided one-half of said certificate of purchase, and (or) all his right, or title, or interest thereunder, and (or) to said land or premises, and (or) to the patent therefor, and (or) that ever since December 7, 1900, or at any other time said plaintiffs have been or now are the lawful owners in undivided proportions as above set forth of said certificate of purchase.

### IV.

Deny that said plaintiffs, or either of them, have

at any time been or are now the lawful owners or otherwise of said land or any portion thereof. Deny that said plaintiffs at any time became, or are still entitled to receive a patent for said land conveying to them the fee simple therefor in said or any proportions.

#### V.

Admit that the defendant, Mary A. Bonynge, claimed to own the land and premises described in the complaint of plaintiffs under and by virtue of a certain certificate of purchase of date, January 23, 1900, and numbered 14,734, issued to her in pursuance of her application to purchase said land dated July 22, 1899, and numbered 6749, up to the 5th day of September, 1908, upon which date the said defendant conveyed the said land and premises by deed of grant, bargain and sale to her co-defendant, [100] W. A. Bonynge.

Deny that said defendant, Mary A. Bonynge, was not qualified or entitled to purchase said land or lands from the State. Deny that said certificate of purchase was unlawfully or improvidently issued to said defendant. Deny that the same constitutes a cloud upon the alleged title of said plaintiffs, or either of them, in or to said lands and premises, or any part thereof.

#### VI.

Deny that the certificate of purchase so issued to S. Davis as aforesaid, and which is alleged in said complaint to have been sold, transferred and assigned to the plaintiffs, has never been vacated, annulled, or set aside. Deny that the same ever since

has been, or now is the only valid and (or) subsisting certificate of purchase issued from the State of California and covering the title to said land. And defendants allege that in truth and in fact the said plaintiffs and each of them well know that the said certificate of purchase has been vacated, annulled and set aside, and is null and void and of no force or effect.

### VII.

Admit that on the 25th day of January, 1909, the State of California issued to the defendant, Mary A. Bonynge, upon the certificate of purchase so issued to her as aforesaid a patent for the land described in the complaint of plaintiffs. Deny that such patent was inadvertently issued to the said Mary A. Bonynge. Deny that she was not at the time entitled thereto for the reason that the only valid and subsisting certificate of purchase covering the title to said land was or is the certificate of purchase so issued to the said S. Davis as aforesaid, or for any other reason, but on the contrary allege the fact to be that the certificate of purchase theretofore issued [101] to Mary A. Bonynge, for said described land was the only valid and subsisting certificate of purchase covering the title thereto at and for a long time prior to the issuance of said patent.

### VIII.

That these defendants have no information or belief upon the subject sufficient to enable them to answer a portion of the allegations set forth and contained in paragraph VIII of said complaint, and placing their denial upon those grounds deny that at

or prior to the issuance of the patent to Mary A. Bonynge the plaintiffs, or either of them, were the owners or owner of any interest in the certificate of purchase issued to the said S. Davis.

Deny that said certificate was then the only valid or subsisting certificate of purchase outstanding covering said land, or then was or ever since has been, or now is a valid and (or) subsisting contract between the State of California and the holders thereof entitling them upon compliance with the provisions of law in such cases made and provided, and (or) upon the payment of the full sum due to the State of California thereunder, to wit, the sum of eight hundred dollars, or any other sum whatever, to a patent therefor, but on the contrary allege the fact to be that at and long prior to the issuance of the patent to the said Mary A. Bonynge, the said certificate had been vacated, annulled and cancelled, a fact well known to the plaintiffs herein at all times.

## IX.

Deny that these defendants, or either of them at any time held, or now hold the legal title to said land, or any portion thereof as an involuntary or implied or other character of trustee by reason of the fact alleged in said complaint, or any facts for said plaintiffs or either of them to the extent [102] of any interest whatever. Deny that these defendants, or either of them, should be required to transfer or convey to said plaintiffs or either of them any interest whatever in said land by the decree of this Court or otherwise. Deny that the said plaintiffs or either of them offer equity in the premises.

## X.

That these defendants have no information or belief upon the subject sufficient to enable them to answer the allegations of paragraph X of said complaint, and placing their denial upon those grounds deny each and every of the allegations therein contained.

## XI.

Admit that the defendant, Mary A. Bonynge, conveyed her interest in and to the said land to the defendant, W. A. Bonynge, but allege that same was conveyed on September 5, 1908, prior to the issuance of said patent. Deny that said W. A. Bonynge took with actual knowledge or notice and (or) with constructive knowledge or notice of the facts stated in the complaint of plaintiffs. Deny that said W. A. Bonynge was not a bona fide purchaser or transferee without notice or for value. Deny that ever since, or at any time the said W. A. Bonynge has been or now is a trustee for plaintiffs, or either of them, to the extent of any interest whatever in said land.

## XII.

Deny that plaintiffs have no other plain, speedy or adequate remedy at law in the premises.

And for a further, separate and special defense to the complaint of plaintiffs and the cause of action alleged therein, and by way of a bar to said action, these defendants allege as follows: [103]

## I.

That on or about the 1st day of August, 1888, one S. Davis made application to purchase from the State of California all of Section 36, in Township 12

North, of Range 24 West, San Bernardino Meridian, in Kern County, California, containing 640 acres of land, and at said time paid to the State of California twenty per cent of the purchase price of said land and the first year's interest in advance upon the balance of said purchase money together with the deposit and filing fees as required by law.

## II.

That on the 20th day of March, 1889, a certificate of purchase of said land was issued to the said S. Davis by the Register of the State Land Office of the State of California, and numbered 11,487.

## III.

That on the 25th day of August, 1892, an action was commenced in the Superior Court of the State of California, in and for the County of Kern, by the People of the State of California against the said S. Davis, and numbered on the records of said court as No. 1431, to foreclose and annul the said certificate of purchase No. 11,487 so issued to said defendant, Davis, as hereinabove set forth, for failure of the said S. Davis to make payment of the interest due upon the unpaid balance of the purchase price of the said land which was due and payable on the 1st day of January, 1892, according to the provisions of the Political Code.

## IV.

That on the 27th day of December, 1892, a decree was duly made and entered by said Superior Court foreclosing and annulling said certificate of purchase No. 11,487 and all rights of the said S. Davis thereunder, and of, in and to the land hereinbefore described. [104]

V.

That no appeal was taken from the said judgment and the same became final on the 27th day of December, 1893.

VI.

That at the commencement of said action in said Superior Court, no notice of any assignment by the said Davis to any person of any interest in said certificate of purchase No. 11,487 had been filed with the Register of the State Land Office for the State of California, as required by the provisions of Section 3552 of the Political Code of the State of California, in cases of assignment.

VII.

That thereafter, to wit, on the 31st day of December, 1900, Fred W. Lake, one of the plaintiffs herein, and claiming to be the successor in interest of the said S. Davis, moved the said Superior Court of Kern County for an order vacating and setting aside the judgment theretofore entered by said Superior Court in the case of The People of the State of California vs. S. Davis, on the 27th day of December, 1892, upon the grounds that no service of summons in said action actual or constructive was ever made, and that said judgment was at all times void, and void upon its face, based upon the affidavits of the said Fred W. Lake, C. H. Gilman and S. Davis, and the records and proceedings in said cause.

VIII.

That thereupon, to wit, on the 31st day of December, 1900, said motion was granted and an order was made and entered by said Superior Court on said

31st day of December, 1900, purporting to set aside and vacate the said judgment theretofore made and entered in said cause on the 27th day of December, 1892, and purporting to set aside and vacate the service of summons upon defendant S. Davis, and his default entered in pursuance thereof. [105]

#### IX.

That thereafter, to wit, on the 29th day of October, 1901, the plaintiff in said action, to wit, The People of the State of California, moved the said Superior Court of Kern County for an order vacating and setting aside the order theretofore made and entered by said Court on the 31st day of December, 1900, in the case of the People of the State of California vs. S. Davis, upon the grounds that said Court had no jurisdiction to make or enter an order setting aside the default of said defendant or said judgment, and that said orders and each of them were null and void, based upon the judgment-roll and records in said cause.

#### X.

That in accordance with said motion an order was duly made and entered by said Superior Court on the 11th day of November, 1901, adjudging and decreeing that the orders of said Court theretofore made and entered in said cause on the 31st day of December, 1900, were null and void, and vacating and setting aside and annulling the same, and adjudging and decreeing the judgment made and entered in said cause to be in full force and effect.

#### XI.

That thereafter, to wit, on or about the 11th day

of January, 1902, the said Fred W. Lake, one of the plaintiffs herein, appealed to the Supreme Court of the State of California from the order made and entered by said Superior Court of Kern County in said cause on the 11th day of November, 1901, and on the 23d day of June, 1904, it was adjudged and decreed by said Supreme Court that the order of said Superior Court of the County of Kern made and entered in said cause on the 11th day of November, 1901, be, and the same was thereby affirmed, and the remittitur of said Supreme Court in said cause was received by the clerk of the Superior Court of the County of Kern on [106] the 25th day of July, 1904, and the same was thereafter filed by said Clerk with the papers of said cause and entered by him as provided by law.

### XII.

That the judgment entered by said Superior Court in said cause on the 27th day of December, 1892, has ever since the 27th day of December, 1893, been, and now is final and in full force and effect.

### XIII.

That the said Fred W. Lake was ever since the 14th day of December, 1900, a party to the proceedings in said cause and to the record therein, and F. D. Brandon, who appears as attorney for the plaintiffs in this action, was ever since the 14th day of December, 1900, attorney of record for the said Fred W. Lake in the case of The People of the State of California vs. S. Davis, and both the said Fred W. Lake and the said F. D. Brandon had knowledge of said proceedings from said date and of the judgment

made and entered by the Supreme Court of the State of California, on the appeal taken by the said Fred W. Lake to said Court in said cause.

#### XIV.

That as these defendants are informed and believe and therefore allege the plaintiff, H. H. Snow, also had knowledge of all proceedings had and taken in the case of The People of the State of California vs. S. Davis, since the said 14th day of December, 1900.

#### XV.

That the rights of said plaintiffs in said certificate of purchase have been fully adjudicated and determined by the final judgment made and entered in the case of The People of the State of California vs. S. Davis, as hereinbefore set forth. [107]

#### XVI.

That as these defendants are informed and believe and therefore allege, no assignment of said certificate of purchase either in whole or in part was made by the said S. Davis to the said C. H. Gilman, or any other person before the 7th day of December, 1900.

#### XVII.

That as these defendants are informed and believe and therefore allege, this action is not brought in good faith by the said plaintiffs, or with the belief that they have a meritorious case, but the same is brought solely and only for the purpose of clouding the title of these defendants to said land and premises and compelling them to buy off the alleged claims of the said plaintiffs to said land and premises in order to clear the said title of record.

And for a further, separate and special defense to said action defendants allege:

I.

That plaintiffs' right or cause of action is barred by section 318 of the Code of Civil Procedure of the State of California.

And for a further, separate and special defense to said action, defendants allege:

I.

That plaintiffs' right or cause of action is barred by section 319 of the Code of Civil Procedure of the State of California.

Wherefore, defendant, having fully answered plaintiffs' complaint, *pray* the judgment of this Court: that plaintiffs take nothing by this action; declaring and adjudging [108] that said judgment and decree of this Court of December 27, 1892, made in said action of The People of the State of California against S. Davis, foreclosing and annulling said certificate against S. Davis, foreclosing and annulling said certificate of purchase No. 11,487, and all rights of said Davis thereunder and of, in and to said Section 36, Township 12 North, of Range 24 West, San Bernardino Meridian, is a good, valid and subsisting judgment, whereby all the rights of said S. Davis and of the plaintiffs herein were terminated and foreclosed; that the aforesaid certificate of purchase No. 14,734 and the patent issued to defendant, Mary A. Bonynge, were lawfully and properly issued to her and that the same are good and valid; and that she and her successors in interest are the owners in fee of all of said land, and that the plaintiffs have not, nor have either of them, any right,

title, interest or estate either legal or equitable, therein, and that they and each of them, be perpetually restrained and enjoined from asserting or claiming any right to or interest therein, or from in any manner asserting or claiming that said judgment is not a good and valid judgment, and for costs and such other, further and general relief as to equity may seem meet and proper.

GEO. E. WHITAKER,  
Attorney for Defendants. [109]

State of California,  
County of Kern,—ss.

Geo. E. Whitaker, being first duly sworn, deposes and says:

That he is the attorney for the defendants in the above-entitled action; that affiant has his office and residence in the City of Bakersfield, County of Kern, wherein said action is pending. That the said defendants reside in the county of Los Angeles. That the facts stated in the Answer are within the personal knowledge of affiant and affiant therefore on said grounds makes this affidavit on behalf of said defendants. That he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

GEO. E. WHITAKER.

Subscribed and sworn to before me this 8th day of March, 1909.

[Seal] GEORGE FLOURNOY,  
Notary Public, in and for the County of Kern, State  
of California.

[Endorsed]: Filed March 9th, 1909. I. L. Miller Clerk.

[Endorsed]: No. 260. In Equity. In the Circuit Court of the United States in and for the Ninth Circuit, Southern District of California, Northern Division. Judd E. Carpenter, Plaintiff, vs. M. J. & M. & M. Consolidated, a Corporation, et al., Defendants. Bill of Complaint. Filed Dec. 30, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. \_\_\_\_\_, Solicitor for Plaintiff, Syndicate Building, Oakland, California. [110]

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**[Subpoena on Complaint (Filed March 7, 1912).]**

UNITED STATES OF AMERICA.

*District Court of the United States, Southern District of California, Northern Division.*

IN EQUITY.

The President of the United States of America,  
Greeting: To the M. J. & M. & M. Consolidated  
(a Corporation), the Ethel D. Company (a Cor-  
poration), the Maricopa 36 Oil Company (a  
Corporation), the Cliff Oil Company (a Cor-  
poration), the Wellman Oil Company (a Cor-  
poration), the M. & T. Oil Company (a Corpora-  
tion), the Associated Transportation Company  
(a Corporation), the Standard Oil Company  
(a Corporation), the Associated Oil Company  
(a Corporation), Emilia E. Graham as Execu-  
trix of the Estate of F. M. Graham, Deceased,  
R. E. Graham, George E. Whitaker, William  
F. Phillips, Mary A. Bonynge, W. A. Bonynge,  
W. C. Price, John Doe, Richard Roe, Samuel

Coe, Harry Green, John Brown, Richard Brown,  
Samuel Gray, Richard Gray and Harry Black.

YOU ARE HEREBY COMMANDED, That you be and appear in said District Court of the United States aforesaid, at the courtroom in Fresno, California, on the 1st day of April A. D. 1912, to answer a Bill of Complaint exhibited against you in said Court by Judd E. Carpenter, who is a citizen of the State of New York, and to do and receive what the said Court shall have considered in that behalf. And this you are not to omit, under the penalty of FIVE THOUSAND DOLLARS.

WITNESS, The Honorable OLIN WELLBORN, Judge of the District Court of the United States, this 21st day of February in the year of [111] our Lord one thousand nine hundred and twelve and of our Independence the one hundred and thirty-sixth.

[Seal]

WM. M. VAN DYKE,  
Clerk.

By Chas. N. Williams,  
Deputy Clerk.

MEMORANDUM PURSUANT TO RULE 12,  
SUPREME COURT U. S.

YOU ARE HEREBY REQUIRED, to enter your appearance in the above suit, on or before the first Monday of April next, at the Clerk's Office of said Court pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

WM. M. VAN DYKE,  
Clerk.

By Chas. N. Williams,  
Deputy Clerk.

Clerk's Office: Los Angeles, California. [112]

United States Marshal's Office,  
Southern District of California.

I HEREBY CERTIFY that I received the within writ on the 28th day of February, 1912, and personally served the same on the 29th day of February, 1912, and March 2d & 3d, 1912, on Ethel D. Oil Co., by D. S. Ewing, Secretary, 2/29/12, Wm. F. Phillips; 3/2/12, Geo. E. Whitaker; 3/2/12, M. & T. Oil Co., by M. J. Lamance, Vice-Pres.; 3/3/12, M. J. and M. M. Con. Oil Co., by M. J. Lamance, Pres.; 3/3/12, by delivering to and leaving with Ethel D. Oil Co., by D. S. Ewing, secretary; 2/29/12, Wm. F. Phillips; 3/2/12, Geo. E. Whitaker; 3/2/12, M. & T. Oil Co.; 3/3/12, by M. J. Lamance, Vice-Pres.; M. J. and M. M. Con. Oil Co., by M. J. Lamance, Pres., 3/3/12,—said defendants named therein, personally, at the counties of Fresno and Kern in said district, a copy thereof.

LEO V. YOUNGWORTH,  
U. S. Marshal.  
By Jos. P. Coyle,  
Deputy.

Fresno, March 5th, 1912.

#### MARSHAL'S RETURN.

I hereby certify that I received the within writ on the 7th day of March, 1912, and personally served the same on the Cliff Oil Co., by serving W. C. Price, President, Wellman Oil Co., by serving W. C. Price, President, W. C. Price, W. A. Bonynge, and Mary A. Bonynge, by serving W. A. Bonynge, at Los An-

geles, California, this 7th day of March, 1912.

LEO V. YOUNGWORTH,

United States Marshal.

By J. F. Durlin, Deputy. [113]

I am also reliably informed that the names of the other *defendants* as follows:

Maricopa #36 Oil Co. Otto Greenwald, Pres. P. D. Kahn Secretary. Alaska Commercial Bldg., 332 Bush St., San Francisco, Cal.

Cliff Oil Co. W. B. Price, Pres. Pacific Electric Bldg.

Wellman Oil Co. W. B. Price, Pres. Pacific Electric Bldg.

Mary A. Bonynge, 1039 Hill St.

W. A. Bonynge, Commercial National Bank, Los Angeles, Cal.

Associated Oil Co. San Francisco. W. F. Herrin, Prest.

Standard Oil Co. 461 Market St., San Francisco, Cal.

Associated Transportation Co. Wells-Fargo Bldg., San Francisco.

Emilia E. Graham. #2820 Oak Knoll Terrace, Berkeley, Cal.

R. E. Graham. 70 Colfax St., San Jose, Cal., Care of Chas. Verser, #12 Market St., San Jose, Cal.

LEO V. YOUNGWORTH,

U. S. Marshal.

By Jos. P. Coyle,

Deputy.

[Endorsed]: Original. Marshal's Criminal Docket No. 1859. C. C. No. 260. U. S. District Court,

Southern District of California, Northern Division.  
In Equity. Judd E. Carpenter, vs. M. J. & M. & M.  
Consolidated, a Corporation, et al. Subpoena. Filed  
Mar. 7, 1912. Wm. M. Van Dyke, Clerk. By Chas.  
N. Williams, Deputy Clerk. [114]

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[Subpoena on Complaint (Filed March 26, 1912).]

To the Marshal of the United States for the North-  
ern District of California.

UNITED STATES OF AMERICA.

*District Court of the United States, Southern Dis-  
trict of California, Northern Division.*

IN EQUITY.

The President of the United States of America,  
Greeting: To the M. J. & M. & M. Consolidated,  
a Corporation, the Ethel D. Company, a Cor-  
poration, the Maricopa 36 Oil Company, a Cor-  
poration, the M. & T. Oil Company, a Corpora-  
tion, the Associated Transportation Company,  
a Corporation, the Standard Oil Company, a  
Corporation, the Associated Oil Company, a  
Corporation.

YOU ARE HEREBY COMMANDED, That you  
be and appear in said District Court of the United  
States aforesaid, at the courtroom in Fresno, Cali-  
fornia, on the 1st day of April, A. D. 1912, to answer  
a Bill of Complaint exhibited against you in said  
court by Judd E. Carpenter, who is a citizen of the  
State of New York, and to do and receive what the  
said Court shall have considered in that behalf.

And this you are not to omit, under the penalty of FIVE THOUSAND DOLLARS.

WITNESS, the Honorable OLIN WELLBORN, Judge of the District Court of the United States, this 26th day of February, in the year of our Lord one thousand nine hundred and twelve and of our Independence the one hundred and thirty-sixth.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk. [115]

MEMORANDUM PURSUANT TO RULE 12,  
SUPREME COURT U. S.

YOU ARE HEREBY REQUIRED, to enter your appearance in the above suit, on or before the first Monday of April next, at the Clerk's Office of said Court pursuant to said Bill; otherwise the said Bill will be taken pro confesso.

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

Clerk's Office: Los Angeles, California.

United States Marshal's Office,  
Northern District of California.

I HEREBY CERTIFY, That I received the within writ on the 29th day of February, 1912, and personally served the same on the 1st day of March, 1912, on the M. J. and M. and M. Consolidated, a corporation, by delivering to and leaving with J. Y. Eccleston, Secretary of the M. J. and M. and M. Consolidated, a corporation, said defendant named

therein, personally, at Oakland, in the County of Alameda in said district, a copy thereof.

C. T. ELLIOTT,

U. S. Marshal.

By M. J. Fitzgerald,

Office Deputy.

San Francisco, Calif., March 1, 1912.

RETURN ON SERVICE OF WRIT.

United States of America,

Northern District of California,—ss.

I hereby certify and return that I served the annexed Subpoena on the therein named The Ethel D. Company (a Corporation), by handing to and leaving a true and correct copy thereof with M. J. Laymance, President of The Ethel D. Company (a corporation), personally, at Oakland, in said District, on the 8th day of March, A. D. 1912.

C. T. ELLIOTT,

U. S. Marshal.

By Geo. H. Burnham,

Chief Office Deputy. [116]

RETURN ON SERVICE OF WRIT.

United States of America,

Northern District of California,—ss.

I hereby certify and return that I served the annexed Subpoena on the therein named Maricopa 36 Oil Company, a corporation, by handing to and leaving a true and correct copy thereof with O. H. Greenwald, President of the Maricopa 36 Oil Company, a corporation, personally, at the City and County of

San Francisco in said District on the 29th day of February, A. D. 1912.

C. T. ELLIOTT,  
U. S. Marshal.  
By M. J. Fitzgerald,  
Office Deputy.

#### RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Subpoena on the therein named Associated Transportation Company, a corporation, by handing to and leaving a true and correct copy thereof with Miss G. Sheridan, Secretary of the Associated Transportation Company, a corporation, personally at the City and County of San Francisco in said District on the 29th day of February, A. D. 1912.

C. T. ELLIOTT,  
U. S. Marshal.  
By M. J. Fitzgerald,  
Office Deputy.

#### RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Subpoena on the therein named Standard Oil Company, a corporation, [117] by handing to and leaving a true and correct copy thereof with William Edwards, Secretary of the Standard Oil Company, a corporation, personally at the City and County of

San Francisco in said District on the 29th day of February, A. D. 1912.

C. T. ELLIOTT,  
U. S. Marshal.

By M. J. Fitzgerald,  
Office Deputy.

### RETURN ON SERVICE OF WRIT.

United States of America,  
Northern District of California,—ss.

I hereby certify and return that I served the annexed Subpoena on the therein named Associated Oil Company, a corporation, by handing to and leaving a true and correct copy thereof with Miss G. Sheridan, Secretary of the Associated Oil Company, a corporation, personally at the City and County of San Francisco in said District on the 29th day of February, A. D. 1912.

C. T. ELLIOTT,  
U. S. Marshal.  
By M. J. Fitzgerald,  
Office Deputy.

Northern District of California,—ss.

I hereby certify and return, that on the 29th day of Feby, 1912, I received the within Subpoena in Equity, and that after diligent search, I am unable to find the within named defendant The M. & T. Oil Company (a corporation) within my district.

C. T. ELLIOTT,  
United States Marshal.  
By Geo. H. Burnham,  
Chief Office Deputy United States Marshal.

[Endorsed]: Original. Marshal's Docket No. 6069. C. C. No. 260. U. S. District Court, Southern District of California, Northern Division. In Equity. Judd E. Carpenter vs. M, J. & M. & M. Consolidated, a Corporation, et al. Subpoena. Filed Mar. 26, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [118]

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**[Joint and Several Demurrer of M. J. & M. & M.  
Consolidated et al. to Complaint.]**

*In the United States District Court for the Southern  
District of California, Northern Division.*

IN EQUITY—C. C. No. 260.

JUDD E. CARPENTER,

Plaintiff,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
et al.,

Defendants.

JOINT AND SEVERAL DEMURRER OF DEFENDANTS M. J. & M. & M. CONSOLIDATED, ETHEL D. COMPANY, MARICOPA 36 OIL COMPANY, CLIFF OIL COMPANY, WELLMAN OIL COMPANY, M. & T. OIL COMPANY, ASSOCIATED TRANSPORTATION COMPANY, STANDARD OIL COMPANY, ASSOCIATED OIL COMPANY, CORPORATIONS, AND EMILIA GRAHAM, AS EXECUTRIX OF THE ESTATE OF F. M. GRAHAM, DECEASED, R. E. GRAHAM, GEO. E. WHITAKER,

MARY A. BONYNGE, W. A. BONYNGE,  
AND W. C. PRICE TO THE BILL OF COM-  
PLAINT OF THE ABOVE-NAMED PLAINTIFF.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, demur thereto, and, for causes of demurrer, show:

1. That said plaintiff has not in and by said bill made or stated such a cause as does, or ought to, entitle him to any such relief as is thereby sought and prayed for, or to any relief, against these defendants or any of them.

2. That it appears on the face of said bill that the causes of complaint are stale, and that so long a time has passed since the matters and things complained of took place that it would be contrary to equity and good conscience for this Court to take cognizance thereof, or to enforce any further or other answer thereto. [119]

3. That it appears on the face of said bill and the allegations therein that more than ten years had elapsed before the filing of said bill since Charles H. Gilman, the predecessor in interest of plaintiff, had notice and actual knowledge of the rendition, entry and filing of the judgment in the action therein mentioned instituted in the Superior Court of the County of Kern, State of California, against S. Davis, to foreclose the certificate of purchase which had theretofore been issued to him, and of all proceedings

therein and thereunder, as alleged in said bill, whereby said cause of complaint and all right to attack said judgment has become barred by the statute of limitations in such cases made and provided.

4. It also appears on the face of said bill and the allegations therein that more than ten years before the filing of said bill plaintiff's said predecessor in interest well knew of the existence of said judgment, and the proceedings thereunder, and that in the month of December, 1900, he tendered to the county treasurer the amount of interest due on the certificate of purchase issued to Davis and the costs in said case of People against Davis, as stated in said bill, and that said Gilman, by his long delay, laches and want of diligence in seeking redress in the premises, was deprived, and plaintiff is deprived, of all right to equitable relief, or to any other relief, in the premises.

5. That it appears on the face of said bill and the allegations therein that the right of action set up in said bill did not accrue, if it accrued at all, to plaintiff or to any of his predecessors in interest, within five years before the bringing of this suit.

6. That it appears on the face of said bill and the allegations therein that the right of action set up in said bill did not accrue, if it accrued at all, to plaintiff or to any of his predecessors in interest, within four years before the bringing of this suit. [120]

7. That it appears on the face of said bill and the allegations therein that the right of action set up in said bill did not accrue, if it accrued at all, to plaintiff or to any of his predecessors in interest, within

three years before the bringing of this suit.

8. That it appears on the face of said bill and the allegations therein that the cause of action attempted to be set forth in said bill is barred by the provisions of section 343 of the Code of Civil Procedure of California ; the same not having been brought within four years after the alleged cause of action accrued, as is shown by the bill.

9. That it appears on the face of said bill and the allegations therein that the cause of action attempted to be set forth in said bill is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of California ; the same not having been brought within three years after the alleged cause of action accrued, as is shown by the bill.

10. That it appears on the face of said bill and the allegations therein that the cause of action attempted to be set forth in said bill is barred by the provisions of section 318 of the Code of Civil Procedure of California ; the same not having been brought within five years after the alleged cause of action accrued, as is shown by the bill.

11. That it appears on the fact of said bill and the allegations therein that the cause of action attempted to be set forth in said bill is barred by the provisions of section 319 of the Code of Civil Procedure of California ; the same not having been brought within five years after the alleged cause of action accrued, as is shown by the bill.

12. That it appears on the face of said bill and the allegations therein that the cause of action attempted to be [121] set forth in said bill is barred by the

provisions of section 316 of the Code of Civil Procedure of California; the same not having been brought within ten years after the alleged cause of action accrued, as is shown by the bill.

13. That the institution of said suit by the People of the State of California against said S. Davis, and the proceedings therein, as alleged in the bill, are a bar to this suit by plaintiff.

14. That the institution of said suit by Thomas L. Moran against Mary A. Bonynge and the intervention therein of said Charles H. Gilman, and the proceedings in said action, as alleged in the bill, are a bar to this suit by plaintiff.

15. That the institution of said suit by Fred W. Lake and H. H. Snow against Mary A. Bonynge and another, and the proceedings therein, as alleged in the bill, are a bar to this suit by plaintiff.

WHEREFORE, these defendants, respectively, demand judgment of this Honorable Court, whether they or any of them shall be compelled to make any further or other answer to the said bill, or to any of the matters and things therein contained; and they pray to be hence dismissed with their respective costs in this behalf sustained.

HUNSAKER & BRITT,  
GEO. E. WHITAKER,

Solicitors for Defendants Cliff Oil Company, Wellman Oil Company and W. C. Price.

GEO. E. WHITAKER,  
EVERTS & EWING,

Solicitors for M. J. & M. & M. Consolidated, Ethel D. Company, and Maricopa 36 Oil Company.

FRANK H. SHORT,

GEO. E. WHITAKER,

Solicitors for Defendants Geo. E. Whitaker, Emilia E. Graham, as Executrix of the Estate of F. M. Graham, and R. E. Graham. [122]

J. W. McKINLEY,

GEO. E. WHITAKER,

Solicitors for Defendants Mary A. Bonynge and W. A. Bonynge.

GEO. E. WHITAKER,

Solicitor for Defendants M. & T. Oil Company, Associated Transportation Company, Standard Oil Company and Associated Oil Company.

WM. J. HUNSAKER,

Of Counsel for said Defendants.

United States of America,

State of California,

County of Los Angeles,—ss.

W. C. Price makes solemn oath and says: That he is one of the defendants in the above-entitled action, and makes this verification on behalf of his codefendants who are named in the foregoing demurrer as well as himself, and that said demurrer is not interposed for delay.

W. C. PRICE.

Sworn to and subscribed before me this 29th day of March, 1912.

[Seal]

COURTNEY LACEY,

Notary Public in and for said County of Los Angeles,  
State of California.

#### CERTIFICATE OF COUNSEL.

I hereby certify that, in my opinion, the foregoing

demurrer is well founded in point of law.

WM. J. HUNSAKER,  
Of Counsel for Demurrants.

[Endorsed]: In Equity. Original. C. C. No. 260. In the United States District Court, Southern District of California, Northern Division. Judd E. Carpenter, Plaintiff, vs. M. J. & M. & M. Consolidated, et al., Defendants. Joint and Several Demurrer of Defendants M. J. & M. & M. Consolidated, et al., to the Bill of Complaint of the Above Named Plaintiff. Filed Mar. 29, 1912. [123] Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Geo. E. Whitaker, Bakersfield, Cal., and Hunsaker & Britt, 1132-1143 Title Insurance Bldg., Fifth and Spring Streets, Los Angeles, Cal., Attorneys for Cliff Oil Co., Wellman Oil Co. and W. C. Price. [124]

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[Separate Demurrer of W. F. Phillips to Complaint.]

*In the United States District Court for the Southern  
District of California, Northern Division.*

IN EQUITY—C. C. No. 260.

JUDD E. CARPENTER,

Plaintiff,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
et al.,

Defendants.

THE SEPARATE DEMURRER OF W. F. PHILLIPS TO THE BILL OF COMPLAINT OF THE ABOVE-NAMED PLAINTIFF.

This defendant, by protestation, not confessing or

acknowledging all or any of the matters in said bill of complaint as therein alleged, demurs thereto, and for cause of demurrer, says:

## I.

The said plaintiff has not, in and by said bill of complaint, made or stated such a cause of action as entitles him to the relief sought nor to any relief whatever as against this defendant.

## II.

That it appears in and by said bill of complaint that the supposed causes of complaint are stale and that so long a space of time has elapsed since the matters and things of which complaint is made transpired that it would be contrary to equity and good conscience for this Court to take cognizance thereof or to enforce any further or other answer thereto.

## III.

That it appears on the face of said bill and the allegations therein contained that more than ten years had elapsed before the commencement of this action since Charles H. Gilman, the predecessor in interest of the plaintiff, had notice of and [125] actual knowledge relative to the rendition, entry and filing of the judgment therein mentioned as being rendered in the Superior Court of Kern County, California, against the said S. Davis, to foreclose the certificate of purchase which had theretofore been issued to him, and of all proceedings therein and thereunder, as alleged in said bill of complaint, whereby said cause of complaint and all right to attack said judgment has become barred by the statute of limitations in such case made and provided.

## IV.

It also appears on the face of said bill and the allegations therein that more than ten years before the filing of said bill plaintiff's said predecessor in interest well knew of the existence of said judgment and the proceedings thereunder, and that in the month of December, 1900, he tendered to the county treasurer of said Kern County the amount of interest due on the certificate of purchase issued to said Davis and the costs in said case of the People against said Davis, as stated in said bill, and that said Gilman, by his long delay in seeking redress in the premises, was deprived, and the plaintiff is deprived, of all right to equitable relief, or of any other relief, in the premises.

## V.

That it appears by said bill of complaint that the supposed right of action set up in said bill did not accrue, if at all, to the plaintiff nor to any of his predecessors in interest, within five years before the commencement of this action.

## VI.

That it appears by said bill of complaint that the supposed right of action set up in said bill did not accrue, if at all, to the plaintiff or to any of his predecessors in interest, within four years before the commencement of this action. [126]

## VII.

That it appears on the face of said bill of complaint that the supposed cause of action set forth in said bill did not accrue, if *at to* the plaintiff or to any of his predecessors in interest within three years

before the commencement of this action.

### VIII.

That it appears on the face of said bill that the supposed cause of action set forth in said bill is barred by the provisions of section 343 of the Code of Civil Procedure of California; the same not having been brought within four years after the alleged cause of action accrued, as set forth in said bill.

### IX.

That it appears on the face of said bill of complaint that the supposed cause of action is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of California; the same not having been brought within three years after the alleged cause of action accrued, as shown by the said bill.

### X.

That it appears on the face of said bill that the supposed cause of action set forth in said bill is barred by the provisions of section 318 of the Code of Civil Procedure of California; the same not having been brought within five years after the alleged cause of action accrued, as set forth in said bill.

### XI.

That it appears on the face of said bill of complaint that the supposed cause of action set forth in said bill is barred by the provisions of section 319 of the Code of Civil Procedure of California; the same not having been brought within [127] five years after the alleged cause of action accrued, as set forth in said bill.

### XII.

That the supposed cause of action is barred by the

provisions of section 315 of the Code of Civil Procedure of California, the same not having been commenced within ten years after the alleged cause of action accrued, as shown by said bill.

### XII.

That the institution of said suit by the People of the State of California against said Davis, and the proceedings therein, are a bar to this suit of the plaintiff.

### XIV.

That the institution of said suit by Thomas L. Moran against Mary A. Bonynge and the intervention therein of said Charles H. Gilman and the proceedings in said action, as alleged in said bill, are a bar to this suit by the plaintiff.

### XV.

That the institution of said suit by Fred W. Lake and H. H. Snow against Mary A. Bonynge and another, and the proceedings therein, as alleged in said bill, are a bar to this action by the plaintiff.

Wherefore, this defendant demands judgment of this Honorable Court whether he shall be compelled to make further answer to this action or to any of the matters and things alleged in said bill; and he prays to be hence dismissed with his costs in this behalf most wrongfully sustained.

THOMAS SCOTT,

C. E. ARNOLD,

C. F. HOLLAND and

NOLEMAN & SMYSER,

Attorneys for W. F. Phillips.

S. M. SMYSER,

Of Counsel for Phillips. [128]

United States of America,  
State of California,  
County of Los Angeles,—ss.

S. M. Smyser, being duly sworn, deposes and says that he is one of counsel for the defendant, W. F. Phillips, and the said defendant is absent from said county of Los Angeles and he cannot be reached within time to make this affidavit so as to enable counsel to file said demurrer within time; that said demurrer is not interposed for delay.

S. M. SMYSER.

Subscribed and sworn to before me this 3d day of May, 1912.

[Seal]                            JOHN HARTLEY,  
Notary Public in and for Los Angeles County, State  
of California.

CERTIFICATE OF COUNSEL.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

S. M. SMYSER,  
Of Counsel for W. F. Phillips. [129]

*In the United States District Court for the Southern  
District of California, Northern Division.*

IN EQUITY—C. C. No. 260.

JUDD E. CARPENTER,

Plaintiff,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation  
et als.,

Defendants.

**AFFIDAVIT OF SERVICE OF DEMURRER BY  
MAIL.**

State of California,  
County of Los Angeles,—ss.

S. M. Smyser, being duly sworn, deposes and says, that he is now, and at all times mentioned in this affidavit, was over the age of 18 years and is one of the attorneys for the defendant, W. F. Phillips, mentioned in said cause; that he is a member of the firm of Noleman & Smyser, who conduct their business in the city of Los Angeles, California, and affiant resides in said city of Los Angeles; that W. D. Cole is the solicitor of record of the said plaintiff and has his office in the Syndicate Building in the City of Oakland, County of Alameda, State of California; that in each of said two cities there is a United States Postoffice and between said two places there is regular daily communication by United States mail; that on May 3, 1912, affiant served the demurrer of the defendant, W. F. Phillips, to the bill of complaint of the plaintiff herein upon the said W. D. Cole, solicitor for the plaintiff herein, by depositing a copy of said demurrer in the United States Postoffice at Los Angeles aforesaid, properly enclosed in a sealed envelope, addressed to the said W. D. Cole, Syndicate Building, Oakland, California, his said place of business, and prepaying the postage thereon.

S. M. SMYSER.

Subscribed and sworn to before me this May 3,  
1912.

[Seal] JOHN HARTLEY,

Notary Public in and for Los Angeles County, California.

[Endorsed]: In Equity. C. C. No. 260. In the United States District Court for the Southern District of California, Northern Division. Judd E. Carpenter, Plaintiff, vs. M. J. & M. & M. Consolidated, a Corporation, et als., Defendants. Demurrer of W. F. Phillips. Filed May 3, 1912. Wm. M. Van Dyke, Clerk. By Murray C. White, Deputy Clerk. Thomas Scott, C. E. Arnold, C. F. Holland and Noleman & Smyser, Attorneys for Phillips.

[130]

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**[Answer of Defendant Standard Oil Company, a Corporation.]**

*In the District Court of the United States, in and for the Southern District of California, Northern Division.*

IN EQUITY.

JUDD E. CARPENTER,

Plaintiff,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
ETHEL D. COMPANY, a Corporation,  
MARICOPA 36 OIL COMPANY, a Corporation,  
CLIFF OIL COMPANY, a Corporation,  
WELLMAN OIL COMPANY, a Corporation,  
M. & T. OIL COMPANY, a Corporation,  
ASSOCIATED TRANSPORTATION

COMPANY, a Corporation, STANDARD OIL COMPANY, a Corporation, ASSOCIATED OIL COMPANY, a Corporation, EMILIA E. GRAHAM as Executrix of the Estate of F. M. GRAHAM, Deceased, R. E. GRAHAM, GEORGE E. WHITAKER, WILLIAM F. PHILLIPS, MARY A. BONYNGE, W. A. BONYNGE, W. C. PRICE, JOHN DOE, RICHARD ROE, SAMUEL COE, HENRY GREEN, JOHN BROWN, RICHARD BROWN, SAMUEL GRAY, RICHARD GRAY and HARRY BLACK,

Defendants.

To the Honorable, The Judges of the District Court of the United States in and for the Southern District of California, Northern Division:

Comes now Standard Oil Company, a corporation, one of the defendants in the above-entitled cause, and making answer to the bill in equity filed against it, and others in the above-entitled cause, now and at all times hereafter saving unto itself all, and all manner of, benefit of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, does say and allege as follows, to wit:

I.

Denies that it has, and expressly disclaims, any right, [131] title or interest, legal or equitable, of, in, or to the real property which is the subject of said bill of complaint, and which is described in said bill of complaint as follows:

Section Thirty-six (36), Township Twelve (12) North, Range Twenty-four (24) West, San Bernardino Base and Meridian.

WHEREFORE, this defendant prays that the said complainant take nothing whatsoever by his bill of complaint or by his action against this defendant, and that he be denied relief against, and be denied his costs against, this defendant, and that this defendant do have and recover from said complainant its costs of suit herein.

Dated May 2, 1912.

STANDARD OIL COMPANY, [Seal]

By W. S. RHUM,  
Vice-president.

Attest: WM. EDWARDS,  
Secretary.

PILLSBURY, MADISON & SUTRO,  
Solicitors for Defendant Standard Oil Company.

[Endorsed]: No. C. C. 260. U. S. District Court,  
Southern District of California, Northern Division.  
Judd E. Carpenter, vs. M. J. & M. & M. Consolidated,  
a Corporation, et al. Answer of Defendant Standard Oil Company, a Corporation. Filed May 4, 1912.  
Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. Pillsbury, Madison & Sutro, Attorneys at Law, Kohl Building, San Francisco. [132]

**[Joint and Several Demurrer of Associated Oil Company et al. to Complaint.]**

*In the District Court of the United States, Southern District of California, Northern Division.*

IN EQUITY—No. 260.

**JUDD E. CARPENTER,**

Plaintiff,

vs.

**M. J. & M. & M. CONSOLIDATED, a Corporation,  
et al.,**

Defendants.

**THE JOINT AND SEVERAL DEMURRER OF  
THE ASSOCIATED OIL COMPANY, ONE  
OF THE DEFENDANTS IN THE ABOVE-  
ENTITLED CAUSE, and of WALTER E.  
BUCK, AS TRUSTEE OF THE ASSOCIA-  
TED TRANSPORTATION COMPANY,  
ALSO A DEFENDANT IN SAID CAUSE,  
(THE LATTER CORPORATION HAVING  
BEEN DISSOLVED AND SAID BUCK HAV-  
ING BEEN APPOINTED TRUSTEE TO  
SETTLE ITS AFFAIRS) TO BILL OF COM-  
PLAINT OF JUDD E. CARPENTER, THE  
ABOVE-NAMED PLAINTIFF.**

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in the said plaintiff's bill to be true, in such manner and form as the same are therein set forth and alleged, do demur thereto, and for cause of demurrer show:

First: That it appears by the plaintiff's own showing by the said bill that he is not entitled to the

relief prayed by said bill against these defendants, or either of them.

Second: That said Bill of Complaint of the plaintiff is wholly without equity.

Third: That it appears by the plaintiff's own showing by the said bill that said cause is barred by the provisions of section 312 and 319 of the Code of Civil Procedure of the State of California.

Fourth: That it appears by the plaintiff's own showing by the said bill that the said cause is barred by the provisions of [133] section 312 and Subdivision 4 of Section 338 of the Code of Civil Procedure of the State of California.

Fifth: That it appears by the plaintiff's own showing by the said bill that said cause is barred by the provisions of sections 312 and 343 of the Code of Civil Procedure of the State of California.

WHEREFORE, these defendants respectively pray the judgment of this Honorable Court, whether they or either of them shall be compelled to make any further or other answer to said bill or any of the matters and things therein contained, and pray to be hence dismissed with their reasonable costs in this behalf sustained.

EDMUND TAUSZKY,

Solicitor and of Counsel for Defendant Associated Oil Company, and for Walter E. Buck, as Trustee of the Associated Transportation Company.

United States of America,  
Northern District of California,  
City and County of San Francisco,—ss.

G. Sheridan makes solemn oath and says: That

she is the Secretary of the Associated Oil Company, the above-named corporation defendant, and that foregoing demurrer is not interposed for delay.

G. SHERIDAN.

Subscribed and sworn to before me, this 9th day of July, 1912.

[Seal] CEDA DE ZALDS,  
Notary Public in and for the City and County of San  
Francisco, State of California.

I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

EDMUND TAUSZKY,  
Of Counsel for Defendant. [134]

[Endorsed]: No. 260. In Equity. District Court of the United States, Southern District of California, Northern Division. Judd E. Carpenter, Plaintiff, vs. M. J. & M. & M. Consolidated, a Corporation, et al., Defendants. Demurrer of Associated Oil Company and Walter E. Buck, as Trustee of Associated Transportation Company. Filed Jul. 10, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Edmund Tauszky, of Counsel for Defendant Associated Oil Company, San Francisco, California.  
[135]

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[Order Sustaining Demurrsers to Complaint and  
Ordering Bill of Complaint Dismissed.]

At a stated term, to wit, the July Term A. D. 1912, of the District Court of the United States of America, in and for the Southern District of California, Southern Division, held at the court-room, in the City of Los Angeles, on Friday, the

eighteenth day of October, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable OLIN WELLBORN, District Judge.

C. C. No. 260—Northern Division.

JUDD E. CARPENTER,

Complainant,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
et al.,

Defendants.

In accordance with the directions of the Hon. Wm. C. Van Fleet, U. S. District Judge, in the opinion this day filed herein, it is by the Court ordered that the several demurrers to the bill of complaint be, and they hereby are sustained, and it is further ordered that said bill of complaint be dismissed.

[Endorsed]: C. C. No. 260. United States District Court, Southern District of California, Northern Division. Judd E. Carpenter, Complainant, vs. M. J. & M. & M. Consolidated, a Corporation, et al., Defendants. Copy of Order Sustaining Demurrer. Filed Oct. 23, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [136]

**[Enrollment.]**

*In the District Court of the United States, Southern  
District of California, Northern Division.*

No. 260.

**JUDD E. CARPENTER,**

**Plaintiff,**

**vs.**

**M. J. & M. & M. CONSOLIDATED, a Corporation,  
ETHEL D. COMPANY, a Corporation,  
MARICOPA 36 OIL COMPANY, a Corpora-  
tion, CLIFF OIL COMPANY, a Corporation,  
WELLMAN OIL COMPANY, a Corporation,  
M. & T. OIL COMPANY, a Corporation, AS-  
SOCIATED TRANSPORTATION COM-  
PANY, a Corporation, STANDARD OIL  
COMPANY, a Corporation, ASSOCIATED  
OIL COMPANY, a Corporation, EMILIA E.  
GRAHAM, as Executrix of the Estate of F.  
M. Graham, Deceased, R. E. GRAHAM,  
GEORGE E. WHITAKER, WILLIAM F.  
PHILLIPS, MARY A. BONYNGE, W. A.  
BONYNGE, W. C. PRICE, JOHN DOE,  
RICHARD ROE, SAMUEL COE, HENRY  
GREEN, JOHN BROWN, RICHARD  
BROWN, SAMUEL GRAY, RICHARD  
GRAY and HARRY BLACK,**

**Defendants.**

The complainant filed his bill of complaint in the United States Circuit Court in and for the Southern District of California, Northern Division, on the

30th day of December, 1911, which bill of complaint is hereto annexed.

A subpoena to appear and answer was thereafter, on the 21st day of February, 1912, issued out of the Clerk's Office of the United States District Court for the Southern District of California, which subpoena was returnable on the 1st day of April, 1912, and is hereto annexed.

A subpoena directed to the Marshal of the United States for the Northern District of California was thereafter, on the 26th day of February, 1912, issued out of the Clerk's Office of the said District Court of the United States, which subpoena was returnable on the 1st day of April, 1912, and is hereto annexed.

[137]

On the 29th day of March, 1912, the defendant the Standard Oil Company appeared herein by Messrs. Pillsbury, Madison & Sutro, its solicitors.

On the 29th day of March, 1912, the defendant, Wm. F. Phillips, appeared herein by Thomas Scott, Esq., and Messrs. Powers & Holland, his solicitors.

On the 29th day of March, 1912, the joint and several demurrer of defendants M. J. & M. & M. Consolidated and others, was filed herein, and is hereto annexed;

On the 30th day of March, 1912, the appearance of the Associated Oil Company, one of the defendants in said action, and also of Walter E. Buck, as Trustee of the Associated Transportation Company, also a defendant in said action, was entered herein by Edmund Tauszky, their solicitor;

On the 3d day of May, 1912, the defendant, W. F. Phillips, appeared herein by Messrs. Noleman &

Smyser, his solicitor;

The separate demurrer of defendant W. F. Phillips to the bill of complaint, was filed herein on the 3d day of May, 1912, and is hereto annexed;

The answer of defendant Standard Oil Company to the bill of complaint, was filed herein on the 4th day of May, 1912, and is hereto annexed;

On the 10th day of July, 1912, the joint and several demurrer of the Associated Oil Company and Walter E. Buck as Trustee, was filed herein, and is hereto annexed;

On the 18th day of October, 1912, the Court made and entered an order herein that the several demurrs to the bill of complaint be sustained and that said bill of complaint be dismissed, a copy of which order is hereto annexed;

On the 23d day of October, 1912, a Final Decree dismissing complainant's bill of complaint, was filed, entered and recorded herein, and is hereto annexed.

[138]

*In the United States District Court for the Southern  
District of California, Northern Division.*

IN EQUITY.—C. C. No. 260.

JUDD E. CARPENTER,

Plaintiff,  
vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
ETHEL D. COMPANY, a Corporation,  
MARICOPA 36 OIL COMPANY, a Corpora-  
tion, CLIFF OIL COMPANY, a Corporation,  
WELLMAN OIL COMPANY, a Corporation,  
M. & T. OIL COMPANY, a Corporation, AS-

SOCIATED TRANSPORTATION COMPANY, a Corporation, STANDARD OIL COMPANY, a Corporation, ASSOCIATED OIL COMPANY, a Corporation, EMILIA E. GRAHAM, as Executrix of the Estate of F. M. Graham, Deceased, R. E. GRAHAM, GEORGE E. WHITAKER, WILLIAM F. PHILLIPS, MARY A. BONYNGE, W. A. BONYNGE, W. C. PRICE, JOHN DOE, RICHARD ROE, SAMUEL COE, HENRY GREEN, JOHN BROWN, RICHARD BROWN, SAMUEL GRAY, RICHARD GRAY and HARRY BLACK,

Defendants.

**Final Decree.**

This cause coming on to be heard upon the several demurrs of the defendants, M. J. & M. & M. Consolidated, Ethel D. Company, Maricopa 36 Oil Company, Cliff Oil Company, Wellman Oil Company, M. & T. Oil Company, Associated Transportation Company, Standard Oil Company, Associated Oil Company, corporations, and Emilia E. Graham, as executrix of the estate of F. M. Graham, deceased, R. E. Graham, George E. Whitaker, William F. Phillips, Mary A. Bonynge, W. A. Bonynge and W. C. Price, filed herein to the bill of complaint, after argument of counsel and due deliberation thereon by the Court, which is fully advised in the premises:

IT IS ORDERED, ADJUDGED AND DECREED that the demurrs of said defendants to the bill of complaint herein be, and each of said demurrs is hereby, sustained, on the ground that there [139]

is no equity in the said bill, that the same is barred by laches, and that complainant is precluded from maintaining said bill by former adjudications.

Whereupon, on consideration thereof, it is ORDERED, ADJUDGED AND DECREED, that complainant's bill of complaint herein be and the same is hereby dismissed, and that defendants do have and recover of and from the complainant their costs herein expended, taxed at \$———.

WM. C. VAN FLEET,  
Judge.

Decree entered and recorded October 23d, 1912.

WM. M. VAN DYKE,  
Clerk.

By Chas. N. Williams,  
Deputy Clerk.

[Endorsed]: Original. C. C. No. 260. In Equity. In the United States District Court, Southern District of California, Northern Division. Judd E. Carpenter, Plaintiff, vs. M. J. & M. & M. Consolidated, a Corporation, et al., Defendants. Final Decree. Filed Oct. 23, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Hunsaker & Britt, 1132-1143 Title Insurance Bldg., Fifth and Spring Streets, Los Angeles, Cal., Attorneys for Defendants. [140]

Whereupon, said bill of complaint, subpoena, subpoena directed to the Marshal for the Northern District of California, joint and several demurrer of defendants M. J. & M. & M. Consolidated and others, separate demurrer of W. T. Phillips, answer of defendant Standard Oil Company, joint and several de-

murrer of Associated Oil Company and Walter E. Buck as Trustee, order sustaining the several demurrers, and said Final Decree are hereto annexed; the said Final Decree being duly signed, filed and enrolled pursuant to the practice of said District Court.

Attest, etc.,

[Seal]

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: C. C. No. 260. In the District Court of the United States for the Southern District of California, Northern Division. Judd E. Carpenter vs. M. J. & M. & M. Consolidated, et al. Enrolled Papers. Filed October 23d, 1912. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Recorded Decree. Register Book No. 1, Page 209.

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*In the District Court of the United States, Southern  
District of California, Northern Division.*

JUDD E. CARPENTER,

Complainant,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
et al.,

Defendants.

### **Memorandum Opinion.**

WALTER SHELTON, JAMES F. PECK and  
CHARLES C. BOYNTON, for Complainant.

WILLIAM J. HUNSAKER and FRANK H.  
SHORT, for Defendants.

VAN FLEET, District Judge:

Further examination of the questions presented by the demurrsers to the bill have but tended to confirm the impressions made upon my mind at the argument, and at its conclusion sufficiently perhaps indicated from the bench, that the complainant's rights as asserted in the bill are barred both by former adjudication and by laches.

The judgment in the case of People vs. Davis, 143 Cal. 673, as interpreted and expounded in Lake vs. Bonynge, 118 Pac. 535, is clearly *res judicata* as to the predecessors in interest of complainant; and the latter having acquired the title counted upon subsequent to the rendition and [142] charged with knowledge of that judgment is equally concluded thereby. Nor does the fact that the judgment in that case was based upon constructive service render it less conclusive as a bar, it having been determined by the State court that the statute providing that mode of service was duly complied with. II Black on Judgments, § 513; McCotter vs. Flynn, 61 N. Y. Supp. 786. The question of the conclusiveness of that judgment having been duly litigated and determined in the State court, cannot be again drawn in question between the parties thereto or their privies in a federal court. II Black on Judgments, secs. 520, 938, and 939.

So much for the question of the bar by judgment.

Upon the question of laches I am clearly of opinion that upon the facts appearing in the bill the attempt to assert complainant's supposed equities here at this date after the intervention of the rights of third parties, upon well-established principals,

comes too late. The fact that during the long interval permitted to elapse between the rendition of the final judgment in People vs. Davis and the filing of this bill, the efforts and activities of complainant's predecessors in interest were expended in the unavailing pursuit of improper remedies, does not avoid the bar of laches as against too late an assertion of a proper one. Frank vs. Butler County, 139 Fed. 119; Boston vs. Haynes, 33 Cal. 31; Varick vs. Edwards, Hoffman's Chan. 382; Cockrill vs. Hutchinson, 135 Mo. 67; Gray's Admr. vs. Berryman, 4 Munf. (Va.) 181.

The demurrers to the bill must be sustained and the bill dismissed; and it is so ordered.

[Endorsed]: C. C. No. 260. N. D. In the United States District Court, Ninth Judicial Circuit, Southern District of California, Northern Division. Judd E. Carpenter, Complainant, vs. M. J. & M. & M. Consolidated, a Corporation, et al., Defendants. Memorandum Opinion on Demurrers to Bill. Filed October 18, 1912. Wm. M. Van Dyke, Clerk. By C. E. Scott, Deputy Clerk. [143]

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*In the District Court of the United States, Southern  
District of California, Northern Division.*

JUDD E. CARPENTER,

Complainant,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
ETHEL D. COMPANY, a Corporation,  
MARICOPA 36 OIL COMPANY, a Corpo-

ration, CLIFF OIL COMPANY, a Corporation, WELLMAN OIL COMPANY, a Corporation, M. & T. OIL COMPANY, a Corporation, ASSOCIATED TRANSPORTATION COMPANY, a Corporation, STANDARD OIL COMPANY, a Corporation, ASSOCIATED OIL COMPANY, a Corporation, EMILIA E. GRAHAM, as Executrix of the Estate of F. M. Graham, Deceased, R. E. GRAHAM, GEORGE E. WHITAKER, WILLIAM F. PHILLIPS, MARY A. BONYNGE, W. A. BONYNGE, W. C. PRICE, JOHN DOE, RICHARD ROE, SAMUEL COE, HARRY GREEN, JOHN BROWN, RICHARD BROWN, SAMUEL GRAY, RICHARD GRAY and HARRY BLACK,

Defendants.

**Petition on Appeal.**

To the Honorable the Judges of said Court:

The above-named complainant, aggrieved by the order and decree heretofore, to wit, on the 18th day of October, 1912, made and entered in and by said court in this cause, dismissing the bill of complaint of complainant in this cause, does hereby appeal this cause from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons and on the grounds specified in the assignment of errors filed herewith, and prays that this appeal be allowed, and that citation issue as provided by law, and also that a transcript of the record of this cause and of the record, papers and

pleadings therein on which said order and decree was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.  
[144]

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

W. D. COLE,  
Solicitor for Complainant.

[Endorsed]: C. C. No. 260. In the District Court of the United States, Southern District of California, Northern Division. Judd E. Carpenter, Complainant, vs. M. J. & M. & M. Consolidated, a Corporation, et al., Defendants. Petition on Appeal. Filed Mar. 27, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. W. D. Cole, Solicitor for Complainant, Syndicate Building, Oakland, Cal.  
[145]

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*In the District Court of the United States, Southern District of California, Northern Division.*

JUDD E. CARPENTER,  
Complainant,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
ETHEL D. COMPANY, a Corporation,  
MARICOPA 36 OIL COMPANY, a Corporation,  
CLIFF OIL COMPANY, a Corporation,  
WELLMAN OIL COMPANY, a Corporation,  
M. & T. OIL COMPANY, a Corporation,  
ASSOCIATED TRANSPORTATION COMPANY, a Corporation,

STANDARD OIL COMPANY, a Corporation, ASSOCIATED OIL COMPANY, a Corporation, EMILIA E. GRAHAM, as Executrix of the Estate of F. M. Graham, Deceased, R. E. GRAHAM, GEORGE E. WHITAKER, WILLIAM F. PHILLIPS, MARY A. BONYNGE, W. A. BONYNGE, W. C. PRICE, JOHN DOE, RICHARD ROE, SAMUEL COE, HARRY GREEN, JOHN BROWN, RICHARD BROWN, SAMUEL GRAY, RICHARD GRAY and HARRY BLACK,

Defendants.

#### **Assignment of Errors.**

The said complainant on his appeal of his suit to the United States Circuit Court of Appeals of the Ninth Circuit, from the order and decree made and entered in said suit on the 18th day of October, 1912, in and by the District Court of the United States for the Southern District of California, Northern Division, dismissing the bill of complaint in said suit, specifies and files the following assignment of errors; and specifies and assigns that said court erred in each respectively of the following particulars:

#### **I.**

In dismissing the bill of complaint of complainant and in entering a final decree in said suit against complainant and in favor of defendants. [146]

#### **II.**

In sustaining the joint demurrer of defendants M. J. & M. & M. Consolidated, Ethel D. Company, Mari-copa 36 Oil Company, Cliff Oil Company, Wellman

Oil Company, M. & T. Oil Company, Associated Transportation Company, Standard Oil Company, Associated Oil Company, Corporations, and Emilia Graham, as Executrix of the Estate of F. M. Graham, deceased, R. E. Graham, George E. Whitaker, Mary A. Bonyngé, W. A. Bonyngé, and W. C. Price to the bill of complaint herein.

III.

In sustaining the several demurrer of defendant *M. J. & M. & M. Consolidated* to the bill of complaint herein.

IV.

In sustaining the several demurrer of defendant Ethel D. Company to the bill of complaint herein.

V.

In sustaining the several demurrer of defendant Maricopa 36 Oil Company to the bill of complaint herein.

VI.

In sustaining the several demurrer of defendant Cliff Oil Company to the bill of complaint herein.

VII.

In sustaining the several demurrer of defendant Wellman Oil Company to the bill of complaint herein.

VIII.

In sustaining the several demurrer of defendant M. & T. Oil Company to the bill of complaint herein.

IX.

In sustaining the several demurrer of defendant Associated Transportation Company to the bill of complaint herein. [147]

**X.**

In sustaining the several demurrer of defendant Standard Oil Company to the bill of complaint herein.

**XI.**

In sustaining the several demurrer of defendant Associated Oil Company to the bill of complaint herein.

**XII.**

In sustaining the several demurrer of defendant Emilia Graham, as Executrix of the Estate of F. M. Graham, Deceased, to the bill of complaint herein.

**XIII.**

In sustaining the several demurrer of defendant R. E. Graham to the bill of complaint herein.

**XIV.**

In sustaining the several demurrer of defendant George E. Whitaker to the bill of complaint herein.

**XV.**

In sustaining the several demurrer of defendant Mary A. Bonynge to the bill of complaint herein.

**XVI.**

In sustaining the several demurrer of W. A. Bonynge to the bill of complaint herein.

**XVII.**

In sustaining the several demurrer of defendant W. C. Price to the bill of complaint herein.

**XVIII.**

In sustaining the joint demurrer of defendants above-named and the several demurrers of each of them and dismissing the bill of complaint herein without granting complainant leave to amend.

**XIX.**

In sustaining said demurrers of defendants and each of them to the bill of complaint herein, on the ground that the cause of action set forth in said bill of complaint is barred by former adjudication.

**XX.**

In sustaining said demurrers and each of them to the bill of complaint herein, on the ground that the cause of action alleged in said bill of complaint is barred by laches.

**XXI.**

In decreeing that the defendants and each of them have and recover of complainant their costs of suit.

Now, in order that the foregoing assignment of errors may be and appear of record, complainant presents to the Court this assignment of errors and prays that such disposition thereof be made as accords with law in such cases made and provided; and further prays that the said order and decree dismissing the bill of complaint of complainant be reversed, and that all and singular the said errors of the Court in this said suit be reversed and corrected.

W. D. COLE,  
Solicitor for Complainant.

[Endorsed]: C. C. No. 260. In the District Court of the United States, Southern District of California, Northern Division. Judd E. Carpenter, Complainant, vs. M. J. & M. & M. Consolidated, a Corporation, et al., Defendants. Assignment of Errors. Filed Mar. 27, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. W. D. Cole, Solicitor for Complainant, Syndicate Building, Oakland, Cal.

*In the District Court of the United States, Southern  
District of California, Northern Division.*

**JUDD E. CARPENTER,**

Complainant,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
ETHEL D. COMPANY, a Corporation,  
MARICOPA 36 OIL COMPANY, a Corpora-  
tion, CLIFF OIL COMPANY, a Corpora-  
tion, WELLMAN OIL COMPANY, a Cor-  
poration, M. & T. OIL COMPANY, a  
Corporation, ASSOCIATED TRANSPOR-  
TATION COMPANY, a Corporation,  
STANDARD OIL COMPANY, a Corpora-  
tion, ASSOCIATED OIL COMPANY, a  
Corporation, EMILIA E. GRAHAM, as  
Executrix of the Estate of F. M. Graham,  
Deceased, R. E. GRAHAM, GEORGE E.  
WHITAKER, WILLIAM F. PHILLIPS,  
MARY A. BONYNGE, W. A. BONYNGE,  
W. C. PRICE, JOHN DOE, RICHARD  
ROE, SAMUEL COE, HARRY GREEN,  
JOHN BROWN, RICHARD BROWN,  
SAMUEL GRAY, RICHARD GRAY and  
HARRY BLACK,

Defendants.

**Order Allowing Appeal.**

Upon the filing of Assignment of Errors and Pe-  
tition on Appeal herein

IT IS HEREBY ORDERED that said petition  
be and the same is hereby granted, and that the

appeal of complainant to the United States Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby allowed;

IT IS FURTHER ORDERED that the said Bond on Appeal be, and the same is fixed at the sum of Five hundred dollars (\$500).

Dated this 2d day of April, 1913.

ERSKINE M. ROSS,  
U. S. Circuit Judge. [150]

[Endorsed]: No. 260. In the District Court of the United States, Southern District of California, Northern Division. Judd E. Carpenter, Complainant, vs. M. J. & M. & M. Consolidated, a Corporation, et al., Defendants. Order Allowing Appeal. Filed Apr. 2, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. W. D. Cole, Solicitor for Complainant, Syndicate Building, Oakland, Cal.  
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*In the District Court of the United States, Southern  
District of California, Northern Division.*

JUDD E. CARPENTER,

Complainant,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
ETHEL D. COMPANY, a Corporation,  
MARICOPA 36 OIL COMPANY, a Corporation,  
CLIFF OIL COMPANY, a Corporation,  
WELLMAN OIL COMPANY, a Corporation,  
M. & T. OIL COMPANY, a Corporation,  
ASSOCIATED TRANSPORTATION COMPANY, a Corporation, STAN-

DARD OIL COMPANY, a Corporation, AS-SOCIATED OIL COMPANY, a Corporation, EMILIA E. GRAHAM, as Executrix of the Estate of F. M. Graham, Deceased, R. E. GRAHAM, GEORGE E. WHITAKER, WILLIAM F. PHILLIPS, MARY A. BONYNGE, W. A. BONYNGE, W. C. PRICE, JOHN DOE, RICHARD ROE, SAMUEL COE, HARRY GREEN, JOHN BROWN, RICHARD BROWN, SAMUEL GRAY, RICHARD GRAY and HARRY BLACK,

Defendants.

**Undertaking on Appeal.**

WHEREAS, lately at a session of the above-entitled court in the above-entitled cause a decree was rendered against complainant above named and in favor of said defendants above named, and Judd E. Carpenter, complainant above named, having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals to reverse the decree of the aforesaid suit, and a citation directed to said defendants above named, and each of them, is about to be issued citing and admonishing them, and each of them, to appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California;

[152]

NOW, THEREFORE, in consideration of the premises, and of such appeal, the undersigned, FI-DELITY AND DEPOSIT COMPANY OF MARY-LAND, a corporation duly organized and doing busi-

ness under and by virtue of the laws of the State of Maryland, and duly licensed for the purpose of making, guaranteeing or becoming a surety upon bonds or undertakings required or authorized by law, and having complied with all the laws of the State of California relative to surety companies does hereby undertake and promise, on the part of the Appellant, that the said Appellant will pay and answer all damages and costs that may be awarded against him on his appeal, or on a dismissal thereof, not exceeding FIVE HUNDRED (\$500.00) DOLLARS, to which amount it acknowledges itself bound.

Dated this 24th day of March, A. D. 1913.

FIDELITY AND DEPOSIT COMPANY OF  
MARYLAND,

[Seal]

By PAUL M. NISPUT,  
Attorney in Fact.

Attest: JAMES W. MOYLES,  
Agent.

Sufficiency of surety on foregoing undertaking approved this 2d day of April, 1913.

ERSKINE M. ROSS,  
U. S. Circuit Judge.

[Endorsed]: No. 260. District Court of the United States, Southern District of California, Northern Division. Judd E. Carpenter, Plaintiff, vs. M. J. & M. & M. Consolidated, a Corporation, et als., Defendants. Undertaking on Appeal. Filed Apr. 2, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. W. D. Cole, Solicitor for Complainant, Syndicate Bldg., Oakland, Cal.  
[153] Fidelity and Deposit Company of Maryland.

Home Office: Baltimore, Md., Sole Surety. Pacific Coast Department, Mills Building, San Francisco, California. [154]

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*In the District Court of the United States, Southern District of California, Northern Division.*

No. 260.

JUDD M. CARPENTER.

Complainant,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
ETHEL D. COMPANY, a Corporation,  
MARICOPA 36 OIL COMPANY, a Corporation,  
CLIFF OIL COMPANY, a Corporation,  
WELLMAN OIL COMPANY, a Corporation,  
M. & T. OIL COMPANY, a Corporation,  
ASSOCIATED TRANSPORTATION COMPANY, a Corporation,  
STANDARD OIL COMPANY, a Corporation,  
ASSOCIATED OIL COMPANY, a Corporation,  
EMILIA E. GRAHAM, as Executrix of the  
Estate of F. M. Graham, Deceased, R. E.  
GRAHAM, GEORGE E. WHITAKER,  
WILLIAM F. PHILLIPS, MARY A.  
BONYNGE, W. A. BONYNGE, W. C.  
PRICE, JOHN DOE, RICHARD ROE,  
SAMUEL COE, HARRY GREEN, JOHN  
BROWN, RICHARD BROWN, SAMUEL  
GRAY, RICHARD GRAY and HARRY  
BLACK,

Defendants.

**Praeipe for Record on Appeal.**

Hon. William M. Van Dyke, Clerk of the Above-entitled Court.

You are hereby requested to prepare Transcript on Appeal in the above-entitled cause to the United States Circuit Court of Appeals in and for the Ninth Circuit, and forward the same to the Clerk thereof at the City of San Francisco, State of California, on or before the 10th day of May, 1913.

You are also hereby further requested and required to include within said Transcript on Appeal the entire record, to wit: Bill of Complaint, and all demurrers thereto, and Judgment Dismissing Bill of Complaint herein; in accordance with Rules 75 and 76 of the New Equity Rules now in force.

W. D. COLE,  
Solicitor for Complainant. [155]

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*In the District Court of the United States, Southern District of California, Northern Division.*

No. 260.

JUDD E. CARPENTER,

Complainant,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
et al.,

Defendants.

**AFFIDAVIT OF SERVICE OF PRAEICEPE  
FOR RECORD ON APPEAL.**

State of California,

City and County of San Francisco,—ss.

Andrew R. Schottky, being first duly sworn, de-

poses and says: That he is a citizen of the State of California, over the age of twenty-one years, and not a party to the above-entitled suit and not interested therein; that he resides at the City and County of San Francisco, State of California; that W. D. Cole is the solicitor for complainant in the above-entitled suit; that said solicitor for complainant resides and has his office at Oakland, County of Alameda, California; that George E. Whitaker and Everts & Ewing are the attorneys for defendants M. J. & M. & M. Consolidated, a corporation, Ethel D. Company, a corporation, and Maricopa 36 Oil Company, a corporation; that Hunsaker & Britt and George E. Whitaker are the attorneys for defendants Cliff Oil Company, a corporation, Wellman Oil Company, a corporation, and W. C. Price; that Frank H. Short and George E. Whitaker are the attorneys for defendants George E. Whitaker, Emilia E. Graham, as executrix of the Estate of F. M. Graham, deceased, and R. E. Graham; that J. W. McKinley and George E. Whitaker are the attorneys for defendants Mary A. Bonynge and W. A. Bonyte; that George E. Whitaker is the attorney for defendants M. & T. Oil Company, a corporation, Associated Transportation Company, a corporation, Standard Oil Company, a corporation, and Associated Oil Company, a corporation; that Thomas Scott, C. E. Arnold and Noleman & Smyser are the attorneys for defendant William F. Phillips; that said George E. Whitaker and said Thomas Scott, and said C. E. Arnold reside and have their offices at Bakersfield, in the County of Kern, State of California; that said Frank H. Short

and said Everts & Ewing reside and have their offices at Fresno, in the County of Fresno, State of California; that said Noleman & Smyser reside and have their offices at Los Angeles, in the County of Los Angeles, State of California; that there is a regular *comunication* by mail between the City and County of San Francisco and said Bakersfield, and between said City and County of San Francisco and said Fresno, and between said City and County of San Francisco and said Los Angeles; that on the 28th day of April, 1913, affiant served a copy of the Praeipe for Record on Appeal in [156] the above-entitled suit on each of said George E. Whitaker, Everts & Ewing, Frank H. Short, Thomas Scott, J. W. McKinley and Hunsaker & Britt, by personally depositing six (6) copies of said Praeipe for Record on Appeal in the Postoffice at said City and County of San Francisco, each copy being enclosed in a sealed envelope, one addressed to George E. Whitaker, as attorney at law, at his office at Bakersfield, County of Kern, California; another copy addressed to Everts & Ewing as attorneys at law, at their office at Fresno, County of Fresno, California; another copy addressed to Frank H. Short, as attorney at law, at his office at Fresno, County of Fresno, California; another copy addressed to Thomas Scott, as attorney at law, at his office at Bakersfield, County of Kern, California; another copy addressed to Hunsaker & Britt, as attorneys at law, at their office at Los Angeles, County of Los Angeles, California; and another copy addressed to J. W. McKinley as attorney at law, at his

office at Los Angeles, County of Los Angeles, California, and paying the postage on each of said six envelopes.

ANDREW R. SCHOTTKY.

Subscribed and sworn to before me this 28th day of April, 1913.

[Seal]

FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: No. 260. In the District Court of the United States, Southern District of California, Northern Division. Judd E. Carpenter, Complainant, vs. M. J. & M. & M. Consolidated, a Corporation et al., Defendants. Praeclipe for Record on Appeal, and Proof of Service Thereof. Filed Apr. 29, 1913. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. W. D. Cole, Solicitor for Complainant, Syndicate Building, Oakland, Cal.

[157]

**[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]**

*In the District Court of the United States of America, in and for the Southern District of California, Northern Division.*

C. C. No. 260.

JUDD E. CARPENTER,

Complainant,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
ETHEL D. COMPANY, a Corporation,  
MARICOPA 36 OIL COMPANY, a Cor-

poration, CLIFF OIL COMPANY, a Corporation, WELLMAN OIL COMPANY, a Corporation, M. & T. OIL COMPANY, a Corporation, ASSOCIATED TRANSPORTATION COMPANY, a Corporation, STANDARD OIL COMPANY, a Corporation, ASSOCIATED OIL COMPANY, a Corporation, EMILIA E. GRAHAM, as Executrix of the Estate of F. M. Graham, Deceased, R. E. GRAHAM, GEORGE E. WHITAKER, WILLIAM F. PHILLIPS, MARY A. BONYNGE, W. A. BONYNGE, W. C. PRICE, JOHN DOE, RICHARD ROE, SAMUEL COE, HARRY GREEN, JOHN BROWN, RICHARD BROWN, SAMUEL GRAY, RICHARD GRAY and HARRY BLACK,

Defendants.

I, Wm. M. Van Dyke, Clerk of the District Court of the United States of America, in and for the Southern District of California, do hereby certify the foregoing one hundred and fifty-seven typewritten pages, numbered from 1 to 157, inclusive, and comprised in one volume, to be a full, true and correct copy of the pleadings and of all papers and proceedings upon which the final decree was made and entered in said cause, and also of the final decree, the memorandum opinion of the Court [158] on demurrers to the bill, the petition on appeal, the assignment of errors, the order allowing appeal and the undertaking on appeal in the above and therein-entitled cause, and that the same together constitute the

transcript of the record on appeal as specified in the praecipe filed in my office on behalf of the Appellant by his solicitor of record.

I DO FURTHER CERTIFY that the cost of the foregoing record is \$80.95, the amount whereof has been paid me on behalf of Judd E. Carpenter, the complainant and appellant in said cause.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the District Court of the United States of America, in and for the Southern District of California, Northern Division, this 22d day of May, in the year of our Lord one thousand nine hundred and thirteen and of our Independence the one hundred and thirty-seventh.

[Seal]

WM. M. VAN DYKE,

Clerk of the District Court of the United States of America, in and for the Southern District of California. [159]

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[Endorsed]: No. 2277. United States Circuit Court of Appeals for the Ninth Circuit. Judd E. Carpenter, Appellant, vs. M. J. & M. & M. Consolidated, a Corporation, Ethel D. Company, a Corporation, Maricopa 36 Oil Company, a Corporation, Wellman Oil Company, a Corporation, Cliff Oil Company, a Corporation, M. & T. Oil Company, a Corporation, Associated Transportation Company, a Corporation, Standard Oil Company, a Corporation, Associated Oil Company, a Corporation, Emilia E. Graham, as Executrix of the Estate of F. M. Graham, Deceased, R. E. Graham, George E. Whitaker, William F. Phillips, Mary A. Bonyng, W. A.

Bonynge, W. C. Price, John Doe, Richard Roe, Samuel Coe, Harry Green, John Brown, Richard Brown, Samuel Gray, Richard Gray, and Harry Black, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Southern District of California, Northern Division.

Received May 23, 1913.

F. D. MONCKTON,  
Clerk.

Filed May 31, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

---

[Order Enlarging Time to May 10, 1913, to File Record in U. S. Circuit Court of Appeals.]

*In the District Court of the United States, Southern  
District of California, Northern Division.*

JUDD E. CARPENTER,

Complainant,

vs.

M. J. & M. & M. CONSOLIDATED, a Corporation,  
et al.,

Defendants.

Upon the showing of good cause, IT IS HEREBY ORDERED that additional time until and including the 10th day of May, 1913, shall be granted within which to return the record on appeal in the above-

entitled cause, and file and docket the same in the Circuit Court of Appeals.

Dated: April 28th, 1913.

ROSS,  
Circuit Judge.

[Endorsed]: No. 260. In the District Court of the United States, Southern District of California, Northern Division. Judd E. Carpenter, Complainant, vs. M. J. & M. & M. Consolidated, a Corporation et al., Defendants. Order Under Rule 16 Enlarging Time to May 10, 1913, to File Record Thereof and to Docket Case. Filed Apr. 28, 1913. F. D. Monckton, Clerk.

**[Order Enlarging Time to May 31, 1913, to File Record, etc., in U. S. Circuit Court of Appeals.]**

*In the District Court of the United States, Southern District of California, Northern Division.*

No. 260.

**JUDD M. CARPENTER,**

Complainant,

vs.

**M. J. & M. & M. CONSOLIDATED, a Corporation,  
et al.,**

Defendants.

Upon motion of solicitor for complainant and appellant and the showing of good cause therefor, IT IS HEREBY ORDERED that additional time until and including the 31st day of May, 1913, shall be and is hereby granted and allowed within which to prepare, return, file and docket the record on appeal in

the above-entitled cause with the Clerk of the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated the 7th day of May, 1913.

ROSS,  
Circuit Judge.

[Endorsed]: No. 260. In the District Court of the United States, Southern District of California, Northern Division. Judd M. Carpenter, Complainant, vs. M. J. & M. & M. Consolidated, a Corporation, et al., Defendants. Order Under Rule 16 Enlarging Time to May 31, 1913, to File Record Thereof and to Docket Case. Filed May 7, 1913. F. D. Monckton, Clerk.

No. 2277. United States Circuit Court of Appeals for the Ninth Circuit. Judd E. Carpenter vs. M. J. & M. & M. Consolidated, etc., et al. Orders Under Rule 16 Enlarging Time to May 31, 1913, to File Record Thereof and to Docket Case. Re-filed May 31, 1913. F. D. Monckton, Clerk.





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No. 2277

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit.

JUDD E. CARPENTER,

*Appellant,*

vs.

M. J. & M. & M. CONSOLIDATED (a corporation)  
ETHEL D. COMPANY (a corporation), MARI-  
COPA 36 OIL COMPANY (a corporation),  
WELLMAN OIL COMPANY (a corporation),  
CLIFF OIL COMPANY (a corporation), M. &  
T. OIL COMPANY (a corporation), ASSOCIATED  
TRANSPORTATION COMPANY (a corporation),  
STANDARD OIL COMPANY (a corporation),  
ASSOCIATED OIL COMPANY (a corporation),  
EMILIA E. GRAHAM, as executrix of the estate  
of F. M. GHAHAM, deceased, R. E. GRAHAM,  
GEORGE E. WHITAKER, WILLIAM F. PHILLIPS,  
MARY A. BONYNGE, W. A. BONYNGE, W. C.  
PRICE, JOHN DOE, RICHARD ROE, SAMUEL COE  
HARRY GREEN, JOHN BROWN, RICHARD  
BROWN, SAMUEL GRAY, RICHARD GRAY and  
HARRY BLACK,

*Appellees.*

**BRIEF FOR APPELLANT.**

## STATEMENT.

### **Section 1. Appeal.**

This case comes here on appeal from a judgment of the District Court dismissing plaintiff's complaint on demurrer of the above named defendants.

### **Section 2. Relief Sought by Plaintiff.**

On December 30, 1911, this action was commenced to vacate and set aside the purported judgment of the Superior Court of Kern County in the case of People v. Davis on the ground that such judgment is void for failure of the court to obtain jurisdiction of the person of defendant in said action. As a consequence of vacating the judgment in People v. Davis, this action seeks further relief that the claims of defendants based upon said judgment be declared subject to the rights of the plaintiff.

### **Section 3. Facts. Acquisition and Deraignment of Titles.**

After the usual allegations of capacity of the various parties and the deraignment of titles, it is alleged that in 1889, S. Davis, a duly qualified citizen, after making payment and complying with the law in all respects, received a certificate of purchase of school lands from the State of California covering the premises in suit, Sec. 36, Twp. 12 N., R. 24 W., S. B. B. & M., which at that time belonged to the State. The entire proceedings taken

to obtain the certificate are alleged in detail, and so far, the validity of the certificate, when issued, has never been questioned, and cannot now be questioned if the judgment in People v. Davis be invalid.

#### **Section 4. Facts. Acquisition and Deraignment of Titles.**

On December 27, 1892, without the service of summons on defendant Davis, the Superior Court of Kern County entered a decree purporting to foreclose this contract. Acting upon this invalid judgment of foreclosure the State entered into another contract of sale with Mary A. Bonynge in January, 1900, and afterwards on January 25, 1909, consummated this contract with her by issuing to her a patent. It is also alleged that Mary A. Bonynge and the other appellees, her successors, at all times had knowledge and notice of the facts constituting the invalidity of the decree in the Davis foreclosure; and it is asked that this decree of foreclosure be adjudged invalid and vacated, and that appellees hold the legal title in trust for appellants.

#### **Section 5. Statement of Federal Question and Related Points.**

As will readily be observed, appellant relies fundamentally upon two rules, one of constitutional

law, and one of equity jurisprudence. Under the first we insist that no man can be deprived of his property without due process of law, which means that he shall be brought into court by some notice before any right can be adjudged against him (Section 1, XIV Amendment U. S. Constitution); and under the second we rely upon the elementary equitable principle that a purchaser with notice of antecedent rights and equities is a wrongdoer and must hold the title subject to such prior equities.

These fundamental principles will be amply discussed in a subsequent subdivision of this brief, but the facts showing a denial of due process of law in *People v. Davis* and giving rise to the operation of the equitable principle just announced will now be stated.

#### **Section 6. Facts. Proceedings in *People v. Davis*.**

On August 25, 1892, an *unverified* complaint was filed in the Superior Court of Kern County to foreclose the interest of Davis in said certificate of purchase (Tr. p. 40). At that time and continuously afterward until entry of judgment on said complaint, defendant Davis resided at Sacramento, California. His residence and postoffice address were known to the State officials, having been set forth in his application for the certificate of purchase as required by law. The only effort made to serve him personally was by placing the sum-

mons in the hands of the sheriff of Kern County, who held it for only three days and returned it with the statement that the defendant could not be found within Kern County (Sheriff's Return, Tr. p. 46). An affidavit for publication of summons was then filed but said affidavit simply stated that diligent inquiry had been made to find defendant but after due diligence he could not be found in this State; that the summons had been placed in the hands of the sheriff, who had made his return that the defendant could not be found in Kern County. Said affidavit wholly failed to state any facts showing any search for defendant or any facts constituting a cause of action against him (see affidavit for publication, Tr. p. 46). This affidavit was the only affidavit or sworn evidence for publication ever used or filed in said cause. Defendant, Davis, was never served with any process in said action, personally or otherwise, and never appeared in said action, and neither he nor his successors in interest ever had any knowledge or notice, constructive or otherwise of said proceeding and said purported judgment in People v. Davis until October 1, 1900, nearly eight years after the entry of said judgment.

#### **Section 7. Facts. Proceedings in People v. Davis.**

The statement in said purported judgment that said defendant had been regularly served with process is not true, for said defendant was never

served in any manner, and the only attempted service ever made was by publication pursuant to the order based upon the aforesaid affidavit. The statement in the endorsement on the back of said complaint that defendant in said action had been regularly served with process is, therefore, not true and said court was, therefore, without jurisdiction to render any judgment in said action against defendant Davis, and the said purported judgment is void, null and of no effect whatsoever.

#### **Section 8. Facts. Order Vacating People v. Davis.**

Immediately and within seventy-six days after learning of said purported judgment of foreclosure, Fred W. Lake, a co-owner of said certificate of purchase, made a motion in People v. Davis, on the ground that there had been no service of summons, personal or constructive, and supported the motion with an affidavit stating that the residence of Davis then was and always had been at Sacramento, and that no service of summons of any character had been made on Davis. An amended motion to vacate this judgment was filed December 24, 1900, and this was supported by the affidavits of Gilman and Davis, in which affidavits it was also stated that the residence of Davis had always been at Sacramento and that this fact was contained in the application of Davis for said certificate of purchase; and also that no service of summons had ever been made on Davis or Gilman.

These affidavits were all filed and became a public record in the case. Pursuant to said motion the court made its judgment vacating said judgment on December 31, 1900.

### **Section 9. Facts. Moran v. Bonynge.**

After issuance of certificate of purchase to Mary A. Bonynge a contest of her right to purchase was instituted by a complaint filed by Thomas L. Moran on July 25, 1900. While this was pending and on the very day that the order vacating People v. Davis was made appellant's predecessors intervened in said contest proceeding asserting the superior right as holders of the Davis certificate, and expressly asserting in the complaint in intervention the invalidity of the judgment in People v. Davis because of lack of jurisdiction in the court to render it. Proceedings were then had by demurrers filed and extensions of time until the 28th day of December, 1907, when an amended complaint in intervention was filed by the same parties; after which demurrers were filed to said amended complaint in intervention, which demurrers were sustained on the 13th day of January, 1908, without leave to amend. Thereupon an appeal was taken to the Supreme Court and said proceedings were finally determined on February 7, 1910.

### **Section 10. Facts. Order Vacating Order Annulling People v. Davis.**

Meanwhile an order was entered in People v. Davis on December 11, 1901, vacating the order of December 31, 1900, setting aside the judgment in that action. Said Lake prosecuted an appeal from such order to this court but said order was affirmed June 23, 1904, on the ground that said judgment was fair on its face and that latent jurisdictional defects could not be inquired into after the expiration of the time fixed by Sec. 473, C. C. P., and that the only method by which such judgment could be attacked would be by proceeding in equity instituted for that purpose (143 Cal. 673).

### **Section 11. Facts. Death of Gilman.**

Charles H. Gilman, the immediate predecessor of plaintiff, died on January 17, 1909, and appellant became the owner of an undivided sixth interest owned by Gilman in August, 1910.

### **Section 12. Facts. Issuance of Patent.**

Notwithstanding the pendency of the appeal from the judgment in Moran v. Bonynge, Mrs. Bonynge made application for and received patent to the land in suit on January 25, 1909.

### **Section 13. Facts. Lake v. Bonynge.**

While the appeal in Moran v. Bonynge was still pending and within thirty-five days after the issu-

ance of said patent the owners of said title other than Gilman commenced an action against Mary A. Bonynge and John Doe to have said Mary A. Bonynge and John Doe declared the owners of the legal title to the premises in suit in trust for the use and benefit of said appellants. This suit resulted in judgment in favor of the defendant therein, which judgment was affirmed by this court October 9, 1911 (161 Cal. 120; 118 Pac. 535). The judgment in this case was based wholly upon the judgment in People v. Davis. Neither appellant nor his predecessor Gilman (representing a sixth interest under the Davis certificate) was a party to Lake v. Bonynge.

#### **Section 14. Facts. Offer to do Equity.**

A tender is made to appellees of such sum as is necessary to reimburse them for all sums expended in obtaining the patent to the premises in dispute.

In 1900 a tender was also made to the county treasurer of Kern County of all sums due on said Davis certificate of purchase. This tender was refused.

#### **Section 15. Prayer for Relief.**

After alleging these facts, the complaint concludes with a prayer that the judgment in People v. Davis be set aside, vacated and annulled. It is then prayed that the court grant full relief by

declaring that appellees hold the premises in trust for appellant, by ordering appellees to convey to appellant, and by decreeing further and complete relief.

### **Section 16. Demurrers.**

Defendants demurred to the complaint on the ground that it does not state facts sufficient to constitute a cause of action, urging specifically

1. That the cause of action stated has become res judicata;
2. That appellant's action has become stale by reason of laches, and is barred by the statute of limitations.

### **Section 17. Judgment.**

The trial court sustained said demurrers without leave to amend and entered judgments of dismissal thereon.

### **Section 18. Issues Involved.**

The points which we undertake to establish in this action may be thus summarized in the order of their importance:

#### **I.**

**The judgment in People v. Davis is void ab initio for want of jurisdiction and cannot constitute the basis of any right against Davis and his successors.**

## II.

Latent jurisdictional defects showing total invalidity of judgment in People v. Davis are now before the court regardless of the recitals in that judgment.

## III.

All prior proceedings have simply questioned the face value of People v. Davis and are not decisive, as res judicata, of the validity of such judgment in this case.

## IV.

The claim of laches and bar by limitation is without merit.

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**POINTS AND AUTHORITIES.****Section 19. Introductory.**

The demands of an orderly argument discussing these issues will require us to depart somewhat from the order of statement adopted in the preceding section. We will therefore undertake at once to make it clear that an equitable remedy exists which permits a judgment defendant to come into court in a separate suit after the expiration of the time fixed by Sec. 473, C. C. P., and allows him to contradict the jurisdictional recitals in the judgment and to establish the want of jurisdiction, notwithstanding such recitals; thus enabling him to have such judgment vacated and set aside; and that we have availed ourselves of such remedy in this suit, and have brought to the attention of the

court, in triable form, facts rendering People v. Davis void.

We shall then argue that the judgment in People v. Davis, unmasked of its record and exposed to the full view of the court, as it is by this suit, is simply a nullity, because it was entered without service of process either actual or constructive, and amounts to a denial of due process of law which gives every man his day in court.

The argument of this all important issue will be followed by a brief exposition of the principles and facts showing our loss of a meritorious right, if People v. Davis be allowed to stand, which will authorize us to invoke the aid of equity to vacate that judgment.

The remainder of the brief will be given to a full discussion of the technical defenses urged to avoid a consideration of this case on its merits. These defenses may be classified as res judicata and laches, and perhaps bar by the statute of limitations. They will be discussed in the order stated.

#### **Section 20. Latent Jurisdictional Defects Reviewable in this Action.**

In view of the fact that the State Supreme Court has already held that the judgment in People v. Davis is fair on its face, it becomes necessary to determine at the outset whether the facts stated in the complaint are sufficient to enable the court to go behind the face of the judgment in People v.

Davis and decide whether or not the court acquired jurisdiction of the person of defendant in that case, regardless of the recitals in the judgment.

In this suit it can make no difference whether the attack made on the judgment in *People v. Davis* is direct or collateral in the technical sense that the judgment so far as this court is concerned is not a domestic judgment. The recitals therein are therefore not binding upon this court and can be contradicted by the actual facts set forth in the complaint.

*Cooper v. Newell*, 173 U. S. 555.

In that case on page 566, it is said:

"In *Thompson v. Whitman*, 18 Wall. 457, a leading case in this court, it was ruled that 'neither the constitutional provision that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, nor the act of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the court by which a judgment offered in evidence was rendered'; that 'the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist'; and that 'want of jurisdiction may be shown either as to the subject-matter or the person, or, in proceedings *in rem*, as to the thing'.

"But while these propositions are conceded, it is insisted that the Circuit Court of the United States for the Eastern District of Texas was bound to treat this judgment rendered by one of the courts of the State of

Texas as if it were strictly a domestic judgment drawn in question in one of those courts, and to hold that it therefore could not be assailed collaterally.

"We are of opinion that this contention cannot be sustained, and that the courts of the United States sitting in Texas are no more shut out from examining into jurisdiction than if sitting elsewhere, or than the courts of another State. A domestic judgment is the judgment of a domestic court, and a domestic court is a court of a particular country or sovereignty. \* \* \* But the courts of the United States are tribunals of a different sovereignty, and exercise a distinct and independent jurisdiction from that exercised by the state courts, and this is true in respect of the courts of the several States as between each other. \* \* \*

"The same rule applies to each, and the question of jurisdiction is open to inquiry even when the judgment of the court of a State comes under consideration in a court of the United States, sitting in the same State."

To the same effect see:

Cooper v. Brazelton, 135 Fed. (C. C. A.)  
476;

Galpin v. Page, Fed. Cas. No. 5206;  
Estate of Hancock, 156 Cal. 804, 811.

Since the judgment in People v. Davis is not domestic in any sense of the word but is strictly within the rule set forth in Thompson v. Whitman, 18 Wall. 457, as outlined in the last quotation, it therefore follows that the recitals in that judgment must be disregarded in this case in view of the express and uncontradicted allegations in

the complaint to the effect that the Superior Court never acquired jurisdiction of the person of the defendant in that action.

We are, however, not compelled to rely alone on this principle because the complaint contains facts constituting a direct attack upon the judgment in People v. Davis and would be sufficient even though that judgment were, as to this court, a domestic judgment.

It is familiar law, often repeated by the decisions, that after the time fixed by Sec. 473, C. C. P., has expired, a judgment rendered without jurisdiction of the person of the defendant may be set aside by motion in the case, where such a lack of jurisdiction appears on the face of the record, or by a proceeding in equity instituted for that purpose, when such defect is latent.

People v. Davis, 143 Cal. 675.

In that case it is pointed out that if the time fixed by Sec. 473, C. C. P., has expired:

“The sole remedy of the aggrieved party, who may not, in fact, have been served, is to be found in a new action, on the equity side of the court.”

The rule in California is also well stated in the Revised Edition of Hayne on New Trials, Sec. 303, p. 1737, as follows:

“If the record, however, falsely recites service of summons, or if, in the case of a silent record, the fact is that no service of summons was made on the defendant, he may have an

action in equity to set aside or enjoin the judgment, as, in such case, he has had no opportunity to present his defense, and can avail himself of the principle stated at the beginning of this section. \* \* \*

"The want of a valid service of summons is a sufficient ground for relief although there be no fraud. But the two grounds frequently concur."

So in Parsons v. Weis, 144 Cal. 411, 416:

"It is recited in said judgment that the plaintiff had been duly served with process, and this recital was sustained by the affidavits of publication of the summons and of depositing in the postoffice the copy of the summons and complaint in accordance with the order of the court. This recital was a judicial determination by the court of the sufficiency of the service, and is entitled to the same presumption of verity as its determination upon any other issue. (Thompson v. McCorkle, 136 Ind. 484; In re Eichoff, 101 Cal. 600.) Upon the face of the judgment record it therefore appears that the court had obtained jurisdiction of the plaintiff herein for the purpose of determining the claim of Weis against her, and this judgment against her must stand unless it can be impeached by some extraneous matter. Being a matter of record, its validity or effect cannot be overcome by evidence of any lower degree. The plaintiff has therefore invoked the aid of equity, setting forth in her complaint and establishing at the trial that the affidavit for the order of publication of the summons was not true in fact, and contends that, as the authority for any constructive service of the summons depends upon the sufficiency of this affidavit, as soon as it was shown that the affidavit was insufficient the

authority for the service disappeared, and the court is shown to have had no jurisdiction to hear the complaint or render the judgment.”

(This contention was upheld.)

These cases established our right to go behind the record of the judgment in People v. Davis whatever may be the term applied to such an attack. It is not our purpose to tie our case to any definition of “direct” or “collateral” attack. What we wish to make clear is that the attack made on People v. Davis here is such as enables the court to disregard the face of the judgment and permits it to determine the validity of such judgment upon its virtues. Using the term “direct attack” to mean exactly that and nothing more it is contended by us that the complaint here constitutes a direct attack. The first and dominant purpose of this action is to vacate, set aside, and annul People v. Davis; the facts showing an entire want of service either actual or constructive are set forth in the complaint, and the prayer of the complaint asks specifically that the judgment in People v. Davis be set aside. That such a complaint is a direct attack upon the judgment of People v. Davis and enables the court to go behind the record cannot, we think, be successfully contradicted. This court has rendered many decisions supporting the proposition and in

Campbell etc. v. Campbell, 152 Cal. 201, 208, the court dealt with a cause of action similar to the one at bar in the following language:

"The order or decree from the effect of which relief is sought cannot constitute a bar to such equitable action. As has been said, it is solely because of the order or decree, collaterally unassailable and valid on its face, that the equitable jurisdiction is necessary and exists. The contention that a proceeding of the kind before us constitutes a collateral attack on the probate orders, is not well founded. *It is a direct attack.*"

To the same effect are the cases:

Bacon v. Bacon, 150 Cal. 481;

Bergin v. Haight, 99 Cal. 52.

A few cases from other jurisdictions dealing with the identical point here involved will be cited.

In Magin v. Lamb, 43 Min. 80; 19 A. S. R. 216, an action to set aside a judgment fair on its face but void in fact for failure to obtain jurisdiction of the person of the defendant, it is said:

"The appellant contends that in this action the judgment is assailed collaterally, and that this is not allowable. This is not a collateral but a direct attack upon the judgment. That is the very object of the action. It was not necessary to make the original judgment creditors parties to the action. The judgment having been assigned to Lamb, he stands in their place, and is the only party in interest."

So in Phelps v. McCallam, 88 N. W. (N. D.) 292, we read:

"An action brought to cancel a judgment for lack of jurisdiction in the court to render it by reason of failure to serve the summons is a direct attack upon such judgment."

It is also held in *McKinney et al. v. Adams*, 50 So. (Miss.) 474:

"By 'collateral attack' is meant any proceeding in which the integrity of a judgment is challenged, except in the action wherein the judgment is rendered, or by appeal, and except a suit to declare the judgment void ab initio, in which a recital in the judgment that defendant had been legally summoned by publication may be contradicted."

The case of *Mosby v. Gisborn et al.*, 54 Pac. (Utah) 121, 127, states the principle very clearly:

"Counsel for the respondents contend that the decree sought to be set aside is not void; that the plaintiff, by this action, has made a collateral attack upon it; and that the relief he asks for that reason cannot be granted. It is undoubtedly true that a judgment or decree cannot be set aside when the attack upon it is collateral, unless it is absolutely void. The question is raised, is this action a direct proceeding to set the decree aside? Motions and bills in chancery to set judgments aside, and appeals or writs of error to reverse them, are direct proceedings. That is the direct purpose of such proceedings. Their aim is the vacation of the judgment and not a collateral one. The attack on the judgment in that case is not incidental to the object of the proceeding. The end of the proceeding is not something collateral to the judgment. A denial of the legal and binding effect of a judgment in a proceeding not instituted for the purpose of annulling or changing it, or of enjoining its execution, must be characterized as a collateral attack upon it. This action, brought to set the decree aside, must be regarded as a direct attack upon it. *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362;

12 Am. & Eng. Enc. Law 147; Owens v. Rans-  
stead, 22 Ill. 162; McCampbell v. Durst (Tex.  
Sup.) 11 S. W. 380; Van Fleet Coll. Attack,  
paragraph 2."

To the same effect, see Graham et al. v. East  
Texas Land & Improvement Co., 50 S. W. (Tex.)  
579.

Although the cases to this point might be mul-  
tiplied indefinitely, we deem the foregoing a suf-  
ficient citation of authority to establish the point  
that the complaint in this case makes a direct attack  
on the judgment in People v. Davis in the sense  
that we are permitted to go behind the face of such  
judgment and urge any facts showing a want of  
jurisdiction over the person of defendant.

### **Section 21. Validity of Judgment in People v. Davis.**

We now offer for consideration the very gist  
of our cause: Is the judgment in People v. Davis  
valid and binding or is it wholly void? "There  
is no half way house." Upon the ultimate and ab-  
solute merits, the single question in the case at bar  
is whether or not the judgment rendered in People  
v. Davis is an effective judgment, and this ques-  
tion has not yet by any court been decided. Appel-  
lant had in the beginning the prior and better right  
and title to the land in suit and that right and  
title still subsists unless it has been destroyed by  
the judgment in People v. Davis. A property  
right cannot be destroyed by a judgment, whatever

its semblance, unless it is such a judgment as rests upon due process of law; and due process of law is impossible always unless there is such notice to the defendant as, under the established procedure, gives the court jurisdiction over him in the cause and power to render a judgment against him. It is the vital and controlling question here, therefore, whether or not the judgment in People v. Davis rests upon service of process; and we urge upon the court that nothing should be allowed to obscure the consideration of that question or its categorical determination.

That the facts alleged in the complaint at bar show an absolute want of jurisdiction of the defendant in People v. Davis cannot, we think, be seriously questioned. In the first place the complaint in that case was *not verified* and the affidavit for publication neither refers to said complaint nor in anywise attempts to state a cause of action against the defendant Davis. In the second place, no facts are stated in the affidavit for publication from which the court could conclude that diligent, or any, effort had been made to serve defendant Davis personally or to determine his whereabouts. In the third place, and finally, any conclusions stated in said affidavit with regard to such diligence are shown by the facts stated in the complaint at bar to have been wholly without foundation.

In the support of the first point just stated we desire to call the court's attention to the recent case of

People v. Mulcahy, 159 Cal. 34, as controlling and of sufficient authority to settle the question. That case, like the Davis case, was brought to foreclose a certificate of purchase of school lands. There, as here, the complaint was not verified and the affidavit for the order of publication did not state that a cause of action existed. For this reason it was held that the judgment was in that case rendered without jurisdiction. It is there said:

"Respondent contends that the affidavit in order to be effective must state probative facts from which the court could ultimately conclude that a cause of action against defendant exists and that he is a necessary and proper party. (Citing County of Yolo v. Knight, 70 Cal. 431, and Columbia Screw Co. v. Warner Lock Co., 138 Cal. 446.) These cases undoubtedly sustain respondent's theory \* \* \*. Actions of this sort are *in invitum* and strict compliance with the statute is necessary. As we have seen, the statute was not closely followed in the requirement that the facts necessary to establish a cause of action should be alleged by a verified instrument—the complaint or the affidavit \* \* \*."

"It follows that the order of the court setting aside the judgment was properly made."

The only difference between that case and this lies in the manner of procedure; there the facts were brought forward on motion; here they are

brought forward by bill in equity—an equally efficient proceeding.

The effect of identically the same evidence in two cases where the court can consider the evidence must bring exactly the same result in both cases.

The evidence in the Mulcahy case came from the judgment roll, and the court was authorized to weigh it and declare the judgment void. Exactly the same facts are alleged in this complaint so that if the court is authorized to receive and consider the evidence in this case the same result must follow as was declared by this court in the Mulcahy case. The question is not therefore as to the effect of the facts alleged; that has been solemnly adjudged by our Supreme Court. The only question is, the power of the court in this proceeding to hear and consider the evidence.

This whole subject was recently fully discussed by the same court in

Estate of Hancock, 156 Cal. 804,  
and no fuller or abler argument could well be made in support of this proposition than appears in the opinion of the court on pages 810 and 811, wherein the following language is used:

“It is established by our decisions that it must be made to appear by the affidavit for publication or by the verified complaint on file that a cause of action exists in favor of the plaintiff, and that if this is not so made to appear the court is without jurisdiction to make any order for publication, and any order made under such circumstances is ineffectual

for any purpose and any attempted service made thereunder is insufficient to give the court jurisdiction over the person of the defendant. \* \* \* It is further established that a statement such as that the plaintiff 'has good cause of action' is not sufficient. Such a statement is nothing more than the mere opinion of the party as to the effect of the facts upon which he relies as constituting a cause of action. As said in *Forbes v. Hyde*, 31 Cal. 353, 'It is merely a statement of the opinion of the witness in relation to a point upon which the judge is required to form his own opinion upon facts which must appear. \* \* \* Facts are the proper and only proper subjects to be set out in affidavits under the provisions of the statute to serve as the basis of judicial action. The affiant's general expression of opinion or belief, without the facts upon which it is founded, is in no sense legal evidence, and does not tend in any degree to prove the jurisdictional facts without which the judge had no authority to make the order.' Upon the propositions we have stated, the following cases are in point: *Ricketson v. Richardson*, 26 Cal. 149; *Braly v. Seaman*, 30 Cal. 610; *Forbes v. Hyde*, 31 Cal. 342; *County of Yolo v. Knight*, 70 Cal. 431 (11 Pac. 662); *Columbia etc. Co. v. Warner etc. Co.*, 138 Cal. 445 (71 Pac. 498). In some of these cases the attack on the judgment was direct, being made on appeal from the judgment, but in all the defect was recognized as jurisdictional. In two, *Braly v. Seaman* and *Forbes v. Hyde*, the attack was collateral. In *Ricketson v. Richardson*, *Forbes v. Hyde* and *County of Yolo v. Knight*, it is expressly held that an affidavit which merely repeats the language or substance of the statute as to the existence of a cause of action is not sufficient, and in Colum-

bia etc. Co. v. Warner etc. Co., the rule as to the essentials in the matter of a showing of a cause of action is clearly set forth."

In Forbes v. Hyde, 31 Cal. 353, the court said:

"The existence of a cause of action against the defendant sought to be served by publication, is a jurisdictional fact which must be shown as provided in the statute before an order for publication of summons can be made, and if it does not so appear, the order for publication is void and the service by publication falls with the order."

See also in this connection the cases of:

- County of Yolo v. Knight, 70 Cal. 431;
- Ricketson v. Richardson, 26 Cal. 149;
- Beckett v. Cuenin, 15 Colo. 281; 25 P. 167;
- Frybarger v. McMillan, 15 Colo. 349; 25 P. 713;
- Columbia Screw Co. v. Warner, 138 Cal. 445;
- Martin v. Parsons, 50 Cal. 500.

Taking up the second jurisdictional defect urged here, it will be remembered that the affidavit for publication is required by Sec. 412, C. C. P., to set forth such *actual facts* as will enable the court to find that defendant "cannot after due diligence be found within the State". The only language in the affidavit under consideration in any manner bearing on this point is as follows:

"That affiant had made diligent inquiry to find said defendant, but cannot, after due diligence, find him in this State. That affiant did, on the 27th day of August, 1892, deliver the summons heretofore issued out of this court in the

above entitled action to the sheriff of Kern County, with instructions to serve the same on said defendant; that thereafter, to-wit, on the 30th day of August, 1892, said sheriff returned said summons to the clerk of this court, with his return endorsed thereon, that said defendant could not be found in Kern County, State of California."

Ricketson v. Richardson, 26 Cal. 152, deals with such a showing as follows:

"An affidavit which merely repeats the language or substance of the statute is not sufficient. Unavoidably the statute cannot go into details, but is compelled to content itself with a statement of the ultimate facts which must be made to appear, leaving the detail to be supplied by the affidavit from the facts and circumstances of the particular case. Between the statute and the affidavit there is a relation which is analogous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. To illustrate: It is not sufficient to state generally, that after due diligence the defendant cannot be found within the state, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence or the facts showing that he is a necessary party should be stated. To hold that a bald repetition of the statute is sufficient, is to strip the court or judge to whom the application is made of all judicial functions and allow the party himself to determine in his own way

the existence of jurisdictional facts—a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the court or judge from the probatory facts, stated in the affidavit, before the order for publication can be legally entered."

Forbes v. Hyde, 31 Cal. 350, arrives at the same conclusion, using the following expression:

"The fact must appear by affidavit before jurisdiction to make the order attaches. That is to say, there must be an affidavit containing a statement of some fact which would be legal evidence, having some appreciable tendency to make the jurisdictional fact appear, for the judge to act upon before he has any jurisdiction to make the order. Unless the affidavit contains some such evidence tending to establish every material jurisdictional fact, the judge has no legal authority to be satisfied, and, if he makes the order, he acts without jurisdiction, and all proceedings based upon it are void."

In Romig v. Gillett, 187 U. S. 112, 115, the Supreme Court of the United States passed upon such an affidavit under a similar statute of Oklahoma, saying:

"It would seem that the facts tending to show such diligence should be disclosed, and that an affidavit merely alleging inability was one of a conclusion of law, and not of facts. McDonald v. Cooper, 32 Fed. 745; Carleton v. Carleton, 85 N. Y. 313; McCracken v. Flanagan, 127 N. Y. 493; 28 N. E. 385; Ricketson

v. Richardson, 26 Cal. 149; Braly v. Seaman, 30 Cal. 610; Kahn v. Matthai, 115 Cal. 689, 47 Pac. 698; Little v. Chambers, 27 Iowa 522; Thompson v. Shiawassee County Circuit Judge, 54 Mich. 236, 19 N. W. 967; Alderson v. Marshall, 7 Mont. 288, 16 Pac. 576. *Nor is this inability shown by the mere fact that a summons issued to the sheriff of the county in which the land is situated is returned not served, for in cases of this kind, by Sec. 3934 a summons can be issued to and served in any county of the territory."*

So also to the same effect are

Alderson v. Marshall, 16 Pac. (Mont.) 578;  
 Kennedy v. Lamb, 182 N. Y. 228; 74 N. E. 834, 836;  
 McCracken v. Flanagan, 127 N. Y. 493; 28 N. E. 386;  
 McLaughlin v. McCann, 123 N. Y. App. 67; 107 N. Y. Supp. 762;  
 MacKubin v. Smith, 5 Minn. 296;  
 Thompson v. Circuit Judge, 19 N. W. (Mich.) 967.

For this additional reason we regard the affidavit for publication so radically defective as to render the purported judgment in People v. Davis an absolute nullity.

Furthermore, whatever showing of diligence may be claimed for the affidavit for publication, such showing is subject to contradiction in this suit and any showing made by the affidavit and any conclusions of diligence which might have been

drawn therefrom are overthrown by the actual facts alleged in the complaint. In the first place it appears that at all times during the pendency of People v. Davis, Davis was a resident of Sacramento, California; that when Davis made application for the certificate of purchase here involved, he gave his Sacramento address in such application; and that such address was never changed. Davis was required to furnish a record of his residence under the positive terms of our statute, no doubt for the very purpose of supplying adequate information in the event of a foreclosure suit; and plaintiff in People v. Davis is conclusively presumed to know such facts had been furnished and were within its easy reach for use in that action.

Parsons v. Weis, 144 Cal. 411, 416, dealt with a much stronger affidavit than in People v. Davis. In that case it was necessary not only to contradict the conclusions drawn from the affidavit of publication but plaintiff was further required to dispute its positive allegations of fact. So here as there, we think the court should hold under the uncontradicted allegations of the complaint that any conclusion of diligence sought to be drawn from the affidavit in People v. Davis is not true in fact, "and the court was shown to have had no jurisdiction to hear the complaint or render the judgment" in People v. Davis.

This is a brief statement of the facts and law showing conclusively, we think, the absolute in-

validity of the judgment in *People v. Davis*. We shall now conclude on this point, believing further elaboration unnecessary in view of the fact that our position on this fundamental issue has not been assailed in this case and the tactics of appellees, so far, have always consisted in strenuously avoiding this issue by the interposition of technical defenses.

### **Section 22. Meritorious Right Against *People v. Davis*.**

Finally before dealing with the defenses urged against the cause at bar we wish to discuss briefly those equities flowing from the facts in suit which authorize us to invoke the aid of equity against the judgment in *People v. Davis*. Unless some beneficial purpose is subserved or the ends of justice promoted equity, of course, will not lend its aid. This principle is generally stated by the current phrase that a meritorious defense must be shown or the judgment will not be vacated. In other words, in order to obtain equitable assistance, it must be shown that the judgment sought to be vacated operates to deprive the one against whom it is rendered of some right or property entitled to protection in a court of equity.

The facts at bar show conclusively that the judgment in *People v. Davis* is not attacked idly. If allowed to stand Davis and his successors have been prejudiced to this extent: that they will have lost, first, their contract rights, under the Davis certifi-

cate of purchase, of the land in suit, and second, they will likewise have lost the opportunity of redeeming their rights under the Davis certificate by reason of that foreclosure; in other words, they will have been deprived of their interest in the land in suit, concededly valuable and lawful, without having been granted an opportunity in that suit to be heard.

The injury resulting from the forfeiture of a person's property without due process of law is so self-evident that it is not necessary to state the meritorious defense in terms. Such right is not in the strict sense of the word a defense at all, although usually so treated.

Parsons v. Weis, 144 Cal. 410, illustrates the point. In that case the plaintiff sought to obtain relief from a void judgment quieting title which if allowed to stand would have deprived her of the property involved without due process of law. It was there held that the very statement of her title was itself a statement of a "meritorious defense."

Fox v. Robbins, 62 S. W. (Tex.) 815, 821, is selected as practically identical with the case at bar and therefore peculiarly applicable. It says:

"But the cancellation of a judgment, on account of its alleged fraudulent procurement, is not the only remedy sought in this action. If it were, then it might, with some plausibility, be said to the complainants: 'You do not and cannot deny the fact that Mary B. Robbins

had a valid and subsisting lien on the property to which your title was subject; and, though you never had your day in court, you cannot complain of its foreclosure, because, if you had been before it, you could not have defeated the lien and were, therefore, not injured by the decree. You can satisfy the judgment and discharge the property of the lien now by paying off the debt for which the decree was rendered.' But the property has been sold under the decree, and a deed of conveyance made to the plaintiff in that suit, and this deed the complainants seek to have cancelled. So, the vacation of the judgment is but a means to the relief. If the appellants' allegations are true,—and there is indisputable proof to support them,—a judgment obtained by fraud has been used to deprive them of property of much greater value than the amount of the indebtedness secured by the lien. When a judgment is obtained in this manner and a defendant's property sold, and the time of redemption expires before he has knowledge of the proceedings against him, or before he is in an attitude to protect his interest, and he is thus cut off from all remedy unless one is given him in equity. The mere fact that he had no defense to the original action will not deprive him of relief when he offers to pay whatever is justly due. (Great Western Mining Co. v. Woodmas of Alston Mining Co., 12 Colo. 46, 20 Pac. 775, 13 Am. St. Rep. 204; Martin v. Parsons, 49 Cal. 94; Litchfield's Appeal, 28 Conn. 127, 73 Am. Dec. 662.)"

The rule stated is well illustrated in the case of tax sales and other statutory proceedings of like character where a man's title is taken away or forfeited by judgment defective for want of jurisdiction of defendant.

Thus in *Holly v. Munroe*, 104 Pac. (Wash.) 508, the action was to quiet title. The defendant relied on a tax sale made in pursuance of a judgment and objected to the same being questioned by plaintiff on the ground that no meritorious defense to the action for taxes was alleged. The court said:

"It is undoubtedly the general rule, which has been uniformly sustained by the decisions of this court, that one seeking the assistance of a court of equity for the purpose of vacating a judgment must show that the former judgment was inequitable, and that he had a good and sufficient defense in whole or in part to the action, for a court of equity will not do an idle thing and open a judgment simply because the proceedings have failed to comply with the forms of law at the instance of a petitioner who would not be benefited by such action of the court. But this court in *Gould v. White*, 103 Pac. 460, held that the rule did not apply to an action to set aside a tax judgment, that a tender of all the taxes paid seemed to be the sole requirement of the statute, and that the defendant could not insist upon more; citing *Hauswirth v. Sullivan*, 6 Mont. 213, 9 Pac. 798, where the reason for the distinction is forcibly announced. Under the authority of this case the complaint was sufficient, there being an allegation of tender of all the taxes due, and of the deposit of the amount tendered in court upon the refusal of the defendants to accept the same. But in reality this is not an exception to the general rule, for the complaint approaches the demands of the rule as nearly as the nature of the action will permit; for, if an allegation of ownership, of sale for taxes without notice and under a void judgment, and a tender of the taxes to the purchaser under such judgment is not sufficient, then one must

stand without remedy against the loss of his property, which is effected without due process of law."

Gould v. White, 103 Pac. 460.

See also:

Martin v. Parsons, 49 Cal. 100;

Bridgeport etc. Bank v. Eldredge, 28 Conn. 556;

Humphreys v. Hays, 122 N. W. (Neb.) 987;  
Hauswirth v. Sullivan, 9 Pac. (Mont.) 798.

On this point we have gone further perhaps than was necessary. We have offered to do full and complete equity to appellees by reimbursing them for all sums expended in obtaining the legal title to the premises, and likewise before the legal title passed made a like tender to the county treasurer of Kern County in 1900, immediately after learning of the existence of People v. Davis.

Not only have we made a full showing of merits here, but it is not, we think, necessary to make such a showing when the judgment is not voidable merely but is a nullity for want of jurisdiction of the person.

Thus, it is said in Pomeroy's Equity, Vol. VI, Sec. 667, that:

"The Constitution of the United States and constitutions of the various states provide that no person shall be deprived of property without due process of law. When a party is not served with process he is not in a position to defend his rights if he have any. It is a dangerous doctrine that a void judgment can

be sustained. It is a boon to the unscrupulous. A plaintiff may obtain a judgment at will and unless his opponent can convince the court that his defense is meritorious relief will be refused."

Judge Freeman likewise announces the rule as follows:

"If, on the other hand, process has not been served upon the defendant, the court has no power to consider whether he has a defense or not, no right to condemn him unheard; and though a defendant owes a debt he may suffer serious injury in having judgment entered thereon without warning, whereby he may be subjected to unnecessary costs and expenses, and deprived of all opportunity to make provision for payment before his property is liable to be seized and sold. The failure to serve process may leave the defendant in ignorance of subsequent proceedings as well as the entry of the judgment, and his first knowledge may be brought to him through a claim that he has lost title to his property by a sale made by authority of the judgment, and that at such sale the property has been struck off at a grossly inadequate price. That one was indebted ought not in equity to preclude him from relief from spoliation, accomplished by the aid of a proceeding judicial in form, but lacking the essential element of all judicial proceedings—jurisdiction of the person condemned. *Hence the mere want of a defense on the merits ought not in all cases to be a sufficient answer to a demand for relief, where process was not served on the complainant and he was without knowledge of the pendency of the action.*"

Freeman on Judgments, Sec. 498.

In the case of the Great West Mining Company v. Woodmas, etc., (Colo.) 20 Pac. 778, the following language was used as to the validity of a sale under judgment in pursuance of a judgment on a debt concededly just but procured without service of summons:

“While courts will not do an idle thing, and therefore will not ordinarily set aside a judgment when it appears by reopening the case the same judgment must be again rendered upon a trial of the cause upon its merits, yet \* \* \* where sales or deeds have been made under such fraudulent judgments, courts have drawn a distinction between such sales and deeds and the fraudulent judgments themselves. (Litchfield’s Appeal, 28 Conn. 127; Martin v. Parsons, 49 Cal. 94.) Before a man’s property is sold and deeded away, he should have an opportunity to pay the debt or redeem the property from sale. This right to redeem is a valuable right, secured by positive statutory enactment; which right, in this case, was denied appellant and its property sequestered without notice to it.”

While we do not have to go so far in this case as to contend that a judgment like People v. Davis, rendered without due process of law may be set aside without a showing of any “meritorious defense” whatsoever, we believe the better rule as pointed out in the excerpts just quoted does not require such a showing to be made. Equity does no vain and idle thing when it protects every man’s right to due process of law so carefully guarded and secured by every system of civilized jurisprudence

on earth. If a defense must be shown before a void judgment is set aside, equity puts it in the power of anyone to write the form of a valid judgment upon the court records with the result that a person may not only excuse himself from the duty imposed upon every complaining litigant of proving his cause subject to the scrutiny of opposing interests but may also impose the duty upon the judgment defendant of disproving the claim against him.

It has never been urged that the plaintiff in a suit to remove cloud on title should make out a "meritorious defense". In such case plaintiff is required merely to state his right or title; to show an instrument valid on its face; and then allege undisclosed facts showing its actual invalidity. So we believe this a sufficient showing of "meritorious defense" to justify the aid of equity.

### **Section 23. People v. Davis and Moran v. Bonynge not Res Judicata.**

The first defense urged by appellees to avoid a consideration of the vital issues just discussed, is that we are precluded from asserting lack of jurisdiction of the court over the person of the defendant in People v. Davis by reason of the decision of the Supreme Court in People v. Davis (143 Cal. 673). We do not see how the decision of that court in that case can be treated as a determination of the issues here, and consequently as a bar.

The proceeding in that court in People v. Davis decided that that judgment was fair on its face and nothing more, because the motion to vacate such judgment was made after the expiration of the statutory time—too late to allow the court to go behind the record and determine the validity of the judgment on the facts of the case. The opinion itself not only makes all this plain, but also suggests the remedy adopted in the suit at bar as adequate to obtain the relief sought. In other words, that court in People v. Davis decided that the motion there was in effect only a collateral attack and that it would be necessary to resort to equity to get behind the record.

People v. Norris, 144 Cal. 422, 424, deals with a situation identical with that in People v. Davis. After citing People v. Davis as a parallel case, the opinion goes on to say that the attack on the judgment as made there and in People v. Davis

“may in one sense of the term be said to be direct; *it is in the technical sense collateral.*

\* \* \* The same rule applies to direct attacks of this kind as to collateral attacks”.

Since the proceedings in People v. Davis constituted merely a collateral attack, the decision there determined nothing as to the issues involved in this case; for it has never been decided by any court so far as we can find that a decision upon collateral attack can constitute a bar by way of former recovery against a proceeding brought purposely to set aside a judgment; which is the form

of direct attack made here. This statement is well fortified by authority. Thus, it is said in Bacon v. Bacon, 150 Cal. 484:

"We have recently held not only that it (proceeding by motion) does not displace the equitable remedy, but also that an adverse decision on such a motion does not necessarily bar a subsequent suit to vacate the judgment for the same cause. (Estudillo v. Security L. and T. Co., 149 Cal. 556 (87 Pac. 19); also Freeman on Judgments, Sec. 511; Simpson v. Hart, 14 Johns. 63; Wistar v. McManus, 54 Pa. St. 318 (93 Am. Dec. 700.).)"

(Each of these authorities is directly in point here.)

Likewise in

Pioneer Land Co. v. Maddux, 109 Cal. 642, we have a decision squarely in point. There a direct attack in equity was made on the judgment in People v. Goodhue. The decision of this court in People v. Goodhue (80 Cal. 199) was urged as a bar. Just as in People v. Davis, so in People v. Goodhue, a motion to vacate the judgment was made after the expiration of the statutory time and relief was denied on the ground that the motion came too late because the judgment was fair on its face (Opinion Paterson, J.). The court held that its decision on such proceeding was no bar to the equity action, for the cardinal reason that no court, however powerful or dignified, can render a valid judgment without the jurisdictional requisites; that the recital and reassertion of such re-

quisites over and over again ever so often by either trial or appellate courts, would not in fact supply a jurisdictional element; and for the further reason the decision in People v. Goodhue, as in People v. Davis, did not determine that the jurisdictional requisites did in truth and in fact exist, but simply pointed out its lack of jurisdiction to investigate those facts because a formal record had been made in the court below. Here is an excerpt of the language used:

“If the judgment was void before the motion, neither the order denying the motion nor the affirmance of that order by this court, imparted to the judgment any force or validity. It has been held that the affirmance by an appellate court of a void judgment imparts to it no validity.”

Appellees may likewise urge that the judgment in Moran v. Bonynge is a bar to this suit because plaintiff's predecessor appeared in that action by way of intervention. But as already pointed out in section 9 supra, demurrers to the complaint in intervention were sustained without leave to amend. It further appears from the opinion of the Supreme Court in that case (157 Cal. 295) that the complaint in intervention, unlike the complaint in this case, failed to state the facts showing a valid certificate of purchase subsisting in Davis; and for that reason it was decided that the demurrers were rightfully sustained.

It is plain that the judgment in that case, under the facts as they there stood, cannot be treated as res judicata here. Thus it is said in

Gould v. Evans Railroad Co., 91 U. S. 528, 534:

"But it is equally well settled, that, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right; for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action."

The questions under discussion in this section have, moreover, been directly passed upon in the case of Lake v. Superior Court, 45 Cal. Dec. 425, 430, where it is said:

"The opposing contention of petitioners is that unless they have lost their right by the bar of the statute of limitations, by laches, by waiver, or by some other familiar method (no question of which is here involved), they are entitled to their day in court to make such showing as they can in a direct attack against the validity of the judgment in People v. Davis. They point out that their effort by motion to cause the vacation of the judgment in People v. Davis, while itself a direct attack, was a direct attack of so narrow a character that they were limited in their presentation of it to the judgment roll alone and could not establish the propositions for which they contended by the affidavits and other evidence which they there offered; that therefore

as to the judgment in People v. Davis by their motion to vacate they not only had not lost their right to attack it directly, but in no sense had they been able to make a direct attack, this court advising them in terms that their relief for their grievance was to be found through the medium of a direct action in a court of equity. To the judgment against them upon demurrer sustained in Moran v. Bonynge they say, first, that there was no trial upon the merits because this court held that they had insufficiently pleaded Davis' right to secure the certificate of purchase (see 1 Freeman on Judgments, sec. 267), and, second, that in trying contests over land referred to the courts by the surveyor-general, the court itself acts as a tribunal of limited jurisdiction, and could not entertain an equitable plea to vacate the judgment in People v. Davis. The propositions thus advanced are so plainly true that they require no discussion."

How, then, can it be urged that the decision on the motion in People v. Davis or the judgment in Moran v. Bonynge is decisive of the suit here, so as to prevent a consideration of the merits?

#### **Section 24. Lake v. Bonynge as Res Judicata.**

It cannot, of course, be contended that Lake v. Bonynge is decisive, as res judicata, of the rights of appellant, since neither he nor his predecessor was a party to that suit.

The decision in that case cannot be urged as an authority here. The court ruled against the contention of appellants, in that case, that by reason

of the statutory replication they should be permitted to go behind the record in People v. Davis, and expressly held that Lake v. Bonynge was identically the same kind of an attack as was made by Lake's motion in People v. Davis after the statutory time had expired. Neither of these attacks permitted the consideration of the latent defects of the judgment showing no jurisdiction of the court over the defendant, which as we have already pointed out is now brought forward for decision in this suit for the first time.

The same principles and reasons which prevent the decision on the motion in People v. Davis from constituting a former adjudication of the issues now presented by the complaint in suit, also prevent the adjudication in the case of Lake v. Bonynge from serving as authority here, for the reason that the judgment in People v. Davis was in Lake v. Bonynge, as in the motion in that suit, involved only collaterally. There can be no question as to the correctness of this assertion. The appellant there sought to have it declared in that case that the judgment in People v. Davis was attacked directly instead of collaterally, and urged upon this and the trial court in that case certain facts showing a lack of service in People v. Davis, and consequently the invalidity of that judgment, which facts and documents would have been receivable in evidence and should have been considered by the court, had the judgment in People v. Davis been involved there by way of direct attack. It

was, however, declared unequivocally that the attack made upon People v. Davis in Lake v. Bonynge was only collateral and that therefore the decision in that case (143 Cal. 673) was res adjudicata in Lake v. Bonynge. This assertion is borne out by the following quotations from the opinion (161 Cal. 124, 127, 131):

“In the view we take of this case it is unnecessary to consider both of these points because we are satisfied that the judgment rendered here on the appeal from the order of November 11, 1901 (People v. Davis, 143 Cal. 673; 77 Pac. 651), is res adjudicata on the subject of the validity of the original judgment and conclusive against *collateral* attack upon it which was sought to be made in the present action in the court below.”

To the same point:

“Under this decision the *status* of the judgment as a valid one was settled forever as against any *collateral attack* upon it by the parties to the appeal or their privies.”

Likewise:

“The same situation is presented here as in the case cited. On the Davis appeal the decision was on the merits—the court determined that an inspection of the judgment roll showed a recital of due service in the judgment and was conclusive evidence that the court had acquired jurisdiction of Davis and the judgment was valid as against any *collateral attack*.”

Furthermore, in Lake v. Bonynge, counsel for appellants there urged upon the attention of the court the cases of

Estudillo v. Security Land Co., 149 Cal. 564;  
Bacon v. Bacon, 150 Cal. 484,

where it was decided that an adverse decision on a motion such as was presented to the court in People v. Davis (143 Cal. 673) was no bar to an equity suit to vacate the judgment for the same cause and the court distinguished the case of Lake v. Bonynge from these cases on the theory that in those cases the attack on the judgment was direct, while in Lake v. Bonynge it was collateral and in doing so the opinion in Lake v. Bonynge makes use of the following language:

"In the two other cases cited the attack upon the decrees was not a collateral attack as here, but a direct attack upon them upon the ground that they had been procured, the one by fraud, the other by mistake. In such cases it is well established that the principle of *res adjudicata* invoked here does not apply."

It must be clear then that neither the motion in People v. Davis nor the issues decided in Lake v. Bonynge involved a direct attack upon the judgment in People v. Davis such as is made here, if the cases of Bacon v. Bacon and Estudillo v. Security Land Co. are to be accepted as the law of this State.

Before closing this branch of our argument, it seems proper to call to your honor's attention that

reason for themselves in the mind of the chancellor. The one controlling question to be determined in every case is, primarily, who has the right of the cause? Which side of the controversy sheds the white light of truth, honesty and fair dealing upon the chancellor's conscience? And when the cause is just, mistakes in remedy, omissions and delays become small factors weighing lightly in the balance of justice. Just as in a great war waged for the holy cause of human liberty, Justice strengthens Right and compensates for unreadiness, mistakes and defeat, so in the just tribunal of equity directed by the chancellor's conscience, a cause fortified by truth and right cannot be defeated by mistakes, omissions and delays, unless they work so great a wrong and injustice as will outweigh the justice and merits of original cause.

In this case appellant brings himself fully within the sheltering care of equity, and invoke a rule as old as that jurisprudence itself. They contend that appellees *with full notice*, have taken a title belonging in equity and good conscience to appellant, in total disregard of such equitable right. Appellant contends that appellees have wronged them by so doing. Who will say now that appellant thus far is not in the right or will pipe even a tiny dissent to the contrary? Are not the appellees then urging an ultimate wrong on appellant, who is earnestly praying this court, according to its forms, to have restored to him that which is his

own? This must ever remain the foundation of the inquiry as to laches in this case. With this dominating fact in the balance must all other facts be weighed.

On this point we ask a careful consideration of the following passage from

Allis v. Hall, 56 Atl. (Conn.) 641:

“The defendant was and is seeking to use a false instrument to consummate a legal fraud upon the plaintiff. Knowledge of the falsity of the instrument and the wrong of his conduct must be imputed to him, since he was a party to both the original agreement and the mutual mistake. His imputation of laches and his claim to avail himself of an equitable estoppel must be judged in view of these two facts. In view of the fraudulent purpose which he is seeking to accomplish, it is to be observed that he is not in a position to appeal with much force to equitable principles to aid him to effect it. In view of his knowledge of the true agreement, of the mistake, and of the plaintiff’s assertion of the true agreement, his attempt to assert the doctrine of laches, or to establish that by any conduct of the plaintiff he has been induced to act to his prejudice, must be beset with difficulties. The law requires diligence largely for the protection of third persons who may, in their innocence, suffer from unreasonable delay. Its application assumes a different aspect when the party who appeals to its protection is one who not only knows the adverse claim and the assertion of it, but the very facts which establish the claim to be a valid one. Essex v. Day, 52 Conn. 483, 1 Atl. 620; Williams v. Wadsworth, 51 Conn. 277; Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290.”

The allegations of the complaint show an invalid judgment in People v. Davis, where appellant had been wronged under the forms of law, without a hearing and without his day in court. Shelter behind this judgment, whatever security it may give because of other reasons, can certainly give none, because of moral considerations. In the scale of right and wrong, in the forum of conscience, this fact itself must weigh against appellees' contention of laches. We start out, then, with two wrongs asserted by appellees; one taking appellant's title with notice, a wrong thundered against from the infancy of equity jurisprudence; the other so admittedly a wrong that every constitution, state and federal, has said in substance that no man shall be deprived of his property without due process of law. With two such facts in the field of consideration, both testifying for appellant, it would indeed require a multitude of small omissions, errors, misjudgment of remedies and most inordinate delays to make out a case of laches, particularly so long as appellant kept proclaiming his rights and did nothing to mislead or to cause appellees to act to their prejudice.

At all times since appellees have undertaken to assert any rights in the land in suit, there has been totally wanting one necessary and vital element of laches. In order to constitute laches, the delay complained of must always have operated to the injury of a litigant claiming the benefit of this equitable principle. There is no fact be-

fore the court which shows that appellees have been injured in any manner. Therefore, appellees' plea of laches fails in this all-important respect.

As said in

Bacon v. Bacon, 150 Cal. 493:

"The delay does not appear to have been in the least injurious or prejudicial to the defendants in respect to their defense in this action, or in any other respect, and therefore, one element of laches is wanting."

It will be unnecessary to cite further authority on this point.

As already stated, we take the position at the outset that appellant was under no duty to proceed in the judgment against People v. Davis within any particular period of time; that if such judgment is void in fact, even though fair on its face, it could constitute no more than a cloud on title, which no amount of delay could ripen into an actual right, and that therefore appellant could choose his own time to move against it. We make exactly the same contention as to appellees' certificate of purchase and shall proceed to consider whether or not said judgment and certificate of purchase are totally void as to appellant.

### Section 27. Same.

*People v. Davis Void, Not Voidable.*

From the facts at bar it appears that the court never acquired jurisdiction over the person of de-

fendant in People v. Davis and that the judgment was therefore totally void. It further appears that appellees, at all times, since the inception of their claim had actual knowledge of the invalidity of such judgment. Appellees cannot therefore claim any advantage from the semblance of validity which the judgment may have had, for a void instrument, although fair on its face is worth no more to those who have notice of its invalidity than if such invalidity appeared on its face. Such judgment, therefore, amounted to no more than so much waste paper and could form no basis of right or claim against appellant.

The cases, however, go much further and hold that even a bona fide purchaser without knowledge of latent jurisdictional defects in a judgment could obtain absolutely no right against any person under such a judgment. The decisions of the United States Supreme Court are cited first in view of the fact that such decisions are controlling in this court under the constitutional provisions relating to due process of law.

Shelton v. Tiffin, 6 How. 186, 187, so decides. In that case the court which rendered the judgment had failed to obtain jurisdiction over the person of the defendant for the reason that the attorney who appeared to represent him in the action was without authority to do so. The judgment as rendered, however, was fair on its face, being free from any adverse presumptions

which might apply to default judgments, and appeared to have been rendered after general appearance of the defendant. It was sought to use this judgment against the defendant as the basis of divesting him of certain property rights on the ground that the claimant of such rights was a bona fide purchaser without notice. The Supreme Court, however, declined to accept this position and decided that the judgment was an absolute nullity, having been rendered without due process of law, and that the rights of the judgment defendant could in no way be affected by it. The following language was used:

“An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property.

“An execution sale under a fraudulent judgment is valid, if the purchaser had no knowledge of the fraud. But in this case L. P. Perry was not amenable to the jurisdiction of the court, and did no act to authorize the judgment. He cannot, therefore, be affected by it, or by any proceedings under it.”

To the same effect is the case of

Pioneer Land Co. v. Maddux, 109 Cal. 642,  
where it is said:

"I think Mr. Van Fleet in his book 'Collateral Attack', Sec. 16, correctly states the law applicable to this case, as follows:

"In order to make a judgment void \* \* \* jurisdiction over the person must be wanting; \* \* \* When either of these defects can be shown, the judgment and all rights and titles founded thereon are void, even in the hands of a bona fide purchaser. In such cases the dignity of the court is of no concern. When a judgment is lacking in any of the foregoing particulars, it matters not whether it was rendered by the highest or the lowest court in the land—it is equally worthless. No one is bound to obey it. The oath of all officers, executive, legislative, or judicial compels them to disregard it. The oath of all officers, executive, legislative or judicial compels them to disregard it. A few cases hold that want of jurisdiction over the person does not make the judgment of a superior court void (Gay v. Smith, 38 N. H. 171, 174; dictum in Kimball v. Fisk, 39 N. H. 110, 116; 75 Am. Dec. 213), but they are out of line, and wrong on principle."

So much for the judgment in *People v. Davis*. Now, as to the certificate of purchase issued to appellees.

### **Section 28. Same.**

#### *Bonynge Certificate Also Void.*

Appellant's certificate of purchase was prior to that of appellees' and since the judgment in *People v. Davis* was void to appellees' own knowledge, the

certificate of purchase issued to them was also void. Thus it is said in

Hickert v. Vandoren, 92 Pac. (Kan.) 593.  
594.

dealing with a contract of sale of school lands subject to the same objection now urged against appellees' certificate and decided under a statute quite like ours:

"The preceding section of the statute provides the steps necessary to be taken to effect such forfeiture. Since the attempted forfeiture proceedings were void, as we have before determined, it follows that the attempted contract of sale of 1906 to the plaintiff was also void as not authorized by law."

Appellees took no greater right under their certificate of purchase than their vendor, the State, had when the certificate was issued, having taken with notice. The State officials had already granted away all that was in their power to transfer by certificate of purchase when the certificate of purchase was issued to Davis. The attempt to transfer the same right which had already been transferred to another and was still outstanding was simply null and void. The appellees' rights in fact were not as good as those of the State at the time their certificate was issued, because the State continued to hold the legal title and still had the right to forfeit its prior contract under the conditions provided by law, but their contract with the State gave them neither the legal title to the prop-

erty nor the right to forfeit the Davis contract, because the moment they asserted a right to forfeit the Davis certificate they admitted its continuance as a valid obligation and consequently the invalidity of their own contract.

### Section 29. Same.

#### *Appellant Under no Duty to Litigate.*

Since the judgment in People v. Davis was a nullity and appellees' certificate of purchase based thereon was also void, having been issued without authority of law and taken by them with full notice of appellant's prior right, appellant was under no duty whatsoever to proceed against said judgment or said subsequent certificate of purchase.

It follows as a consequence from the authorities just cited that delay in this case cannot operate to bar appellant's rights under any claim of laches. Thus it is said in

Lapham v. Campbell, 61 Cal. 300:

"No one is called to act in a judicial proceeding in which jurisdiction over his person has not been obtained. And although he be a party named in the proceeding, yet if jurisdiction over him be not obtained, he has no duty to perform in relation to the proceeding for the non-performance of which he is chargeable with mistake, surprise, or inexcusable neglect, and as he is not chargeable with any of those things, he was not called upon to avail himself of any of them as ground for a motion to set aside a judgment; nor is he chargeable with laches or want of diligence

for not knowing of the proceeding or judgment. The party procuring a judgment against another without due process of law, or by fraud takes it at his peril."

The Supreme Court of Montana in  
Hauswirth v. Sullivan, 9 Pac. 804, 805,  
has also held:

"No laches of a defendant can give life to a judgment dead at its birth. As against such a judgment he cannot sleep on his rights. \* \* \*

"He could rest in entire security until an effort was made to enforce the void judgment, and then bring his action and have it set aside. A person's property cannot be confiscated any more than his life or liberty can be taken until he has had his day in court and there has been an adjudication according to the law of the land."

The two cases last cited dealt with judgments fair on their faces. To the same effect see

Himmelsberger &c. v. McCabe, 119 S. W.  
(Mo.) 357;  
Cobley v. Barker, 98 N. W. (Ia.) 289;  
State v. Sponangle, 43 L. R. A. 727, 735; 32  
S. E. 283.

What duty devolved upon the holders of the Davis certificate to bring any action? The fact was that the State of California had made two contracts for the sale of the same land. Was it to be assumed that the State was going to violate the first contract and issue a patent to the holder of the second contract? And this too, when it has been informed, through its attorney, the District

Attorney of Kern County, by the motions then made to vacate People v. Davis, and again on the land contest cases then on appeal, of the invalidity of People v. Davis. The holder of the first contract of sale, which could only be terminated as the law provided, and then with a year's right of redemption after judgment, had a right at all times to assume that the holder of the second certificate was claiming in subordination, not in hostility, and no duty devolved on him to commence any action. This first notice which the holders of the Davis certificate could have that the State would or intended to violate the first certificate was when the patent was issued to Mary Bonynge. Up to that time, assuming the State had a right to make two contracts, the two certificates stood in all respects the same, except one particular, that of time, with the principle first in time, first in right, absolutely controlling. And the Davis certificate could rely entirely upon this as giving them the land. If the case was reversed, it might be claimed with some force (admitting the action could be maintained at all), that the holders of the second certificate should have maintained an action. No sound reason can be assigned, however, why the holder of the first certificate should not rely upon the fact of his superior right, a right determined by the date on the face of his certificate. Can it be asserted with any plausibility that a holder of a certificate must constantly bring actions against everyone to whom the state officials may give the

appearances of rights. Surely a certificate under such a rule would be an incubator of trouble, unavoidable by its holder, and caused by others not under his control. The sound rule must ever be that the certificate brings security from trouble, not a deluge of cares.

In view of the foregoing, we do not think it can be successfully disputed that all proceedings taken against appellant's certificate of purchase prior to the issuance of the patent in 1909, constitute only a cloud on title, against which he was not required to move to prevent a defense of laches.

### **Section 30. Same.**

#### *Failure to Pay Interest Not Material.*

Appellant's failure to pay the accrued interest under the Davis certificate of purchase for a period of eight years, can constitute no ground of complaint against him by appellees and consequently cannot be made the basis of any claim of laches. The rights of appellant under such certificate of purchase subsisted continuously with as much vigor and vitality when the interest was not paid and until foreclosure proceedings were taken as required by law, as if each installment of interest had been paid promptly. The contract in this case is the usual contract for the sale of lands where the vendor agrees to convey on the one side and the vendee on the other gives in return his promise to pay on demand, with a further agreement

to pay annual interest meanwhile. Under such a contract the equities and rights of the vendee are in no wise impaired by his failure to pay interest, or even by his failure to pay the principal sum on demand. In order to deprive him of his rights it is necessary under elementary principles of equity that his interest be foreclosed, and it can be terminated in no other way.

We are not compelled to rely upon this elementary principle of equity alone, but are aided by the express provisions of the statute covering this subject. The law does not *ipso facto* wipe out a certificate of purchase, and the rights thereunder, for a failure to pay annual interest, but on the contrary provides a certain definite and exclusive method of terminating the rights of a certificate holder. It is provided that if the vendee fails to pay his interest, demand shall be made upon him and a warning notice published for a definite period of time in the county where the land is situate and that if he should then fail to pay, an action may be commenced against him in which he is protected by due process of law and finally upon the taking of such a judgment of foreclosure, the law gives him even yet a year longer in which to come in and redeem his rights under the certificate of purchase. Such is the method provided by law and is the exclusive and only method for passing a title under a certificate of purchase out of the owner thereof and revesting it in the State.

We will support our position on this proposition by a reference and citation to the case of

Hyde v. Redding, 74 Cal. 500,

where the Supreme Court, sitting in bank, decided that the failure to pay interest for a period of eleven years after a void judgment had been entered, did not constitute an estoppel or laches. It is there said:

“Was the plaintiff guilty of such laches \* \* \* as deprived him of the right to seek equitable relief? He waited eleven years after the judgment in People v. Green, but only nine months elapsed after the certificate of purchase issued to Wolf and Lee. \* \* \* There was no laches such as deprived the plaintiff of his right to sue.”

In the case of

Spencer v. Smith, 85 Pac. (Kan.) 573, 574, we have a decision supporting Hyde v. Redding in very explicit language:

“He (the purchaser) \* \* \* paid one-tenth of the purchase price in cash and continued to pay the accruing interest on the balance until February, 1897, when he made default. No other payment was made by him, nor was there any offer of payment, either of interest or taxes until September, 1905 (over eight years) when he proposed to pay the interest and taxes then due, but the county treasurer to whom tender was made declined to inform him of the amount due according to the records, or to receive payment, upon the ground that Spencer’s contract rights had been forfeited and the land sold to another. \* \* \*”

Upon these facts it was contended that the purchaser was no longer in a position to assert his rights under a certificate of purchase for reasons similar to those urged by appellees. The court there, however, denied this contention in the following language:

“The policy of the state in respect to the disposition of school land is against that theory. The statute which expresses the state’s policy provides that a purchaser of school land who is in default may pay the delinquent interest and taxes, and this without limitation as to the time of default or the circumstance of possession. Laws 1903, p. 723, c. 477. The privilege accorded by statute cannot be denied by the county treasurer, and the right of redemption remains in the purchaser until his rights are forfeited as the statute provides. Even after the notice of forfeiture is given the purchaser still has 60 days within which to make payment of the delinquency, and may thus prevent a forfeiture.”

Thus, it is clear, that the statute alone is the measure of the right acquired under the certificate of purchase and provides the exclusive means by which such right may be forfeited, and courts of equity are as effectually bound by the terms of the statute as courts of law. The principle is succinctly stated in

Pomeroy’s Equity Jurisprudence, Sec. 281,  
page 468,

as follows:

“Whenever a legal right is wholly created by a statute and a legal remedy for its violation is

also given by the same statute, a court of equity has no authority to interfere with its reliefs, even though the statutory remedy is defective, uncertain and incomplete."

So it must appear any failure to pay interest could in no way affect the rights of the parties here.

### **Section 31. Same.**

#### *Appellant Without Effectual Remedy Until Patent Issued.*

The only basis upon which laches can be claimed by appellees is that appellant has omitted to do some act or thing which he was in duty bound to do in order to prevent loss to appellees. Upon this point what is it that appellees claim appellant has omitted to do?

It is suggested that a mandamus proceeding against the State officials could have been instituted to protect our interests; but the futility of such a proceeding must be almost self-evident. In the first place, mandamus is not a proceeding in which the judgment of People v. Davis could have been vacated,—and without this relief our rights could not be effectually asserted. In the second place, mandamus is not a writ by which title or equities can be tried (Gregory v. Blanchard, 98 Cal. 312). And, finally, so far as appellees are concerned, it would have made absolutely no difference to their rights one way or another if a mandamus proceeding had been instituted against the State officials; and they

could have been in no way affected, no matter what the decision in such mandamus proceeding might have been, for the very elementary reason that they could not and would not have been parties to such a proceeding, and consequently would have been neither aided nor bound thereby. This proposition finds direct support in

Beatty v. Smith, 90 Pac. (Kan.) 272, which holds that appellees do not appear adversely to parties standing in the position of appellant, and any decision made would not be *res judicata* as to them.

A contest proceeding has likewise been suggested. But it will be borne in mind that the contest suit between Moran and Bonynge had been instituted in July, 1900, prior to the time when appellant learned of the adverse claim against him. As was held in

Youle v. Thomas, 146 Cal. 537, it was then too late to procure a reference from the State officials, and it was likewise decided in the same case, that without such reference it was impossible to institute such contest proceeding. This we think a conclusive answer to the position that we have been guilty of any laches in failing to institute such a suit.

It has also finally been suggested that a suit to quiet title might have been instituted and the rights which we now claim might have been determined in such suit.

At the time the discovery was made, October 1, 1900, there was a contest pending between Moran and Bonynge. The contest would determine whether either of these, and if either, then which one, should purchase the land.

McFaul v. Pfankuch, 98 Cal. 400.

This controversy, the holders of the Davis certificate could only stand by and watch.

Youle v. Thomas, 146 Cal. 537.

The decision there might be in favor of Moran, it might be in favor of Bonynge, or it might be in favor of the State (that is, that neither party was entitled to purchase). In this last alternative, the holders of the Davis certificate would be exactly where they were before any attempt was made by Mrs. Bonynge to purchase.

Suppose again that suit to quiet title had been commenced against Moran and Bonynge, and the decision in the contested land case had been in favor of the State, such proceeding would not have bound the State, and the result would have been absolutely nil.

It was not, therefore, until the judgment in Moran v. Bonynge that any action with any certainty of result could be commenced. That judgment was not rendered until in 1908. An appeal was taken therefrom at once by the holders of the Davis certificate.

Furthermore, in order to maintain a suit to quiet title, as in every other proceeding which has been

suggested, it was equally necessary to vacate the judgment in *People v. Davis*. In order to vacate that judgment, the State was and continued to be an indispensably necessary party, as distinguished from a proper party, until the patent was issued in 1909. Even in the absence of a judgment, in the ordinary suit to quiet title, the State was an indispensable party so long as it held the legal title. If a suit to quiet title had been instituted, we would have been met at the very threshold of that action with the objection that there had been a non-joinder of necessary parties such as would have enabled a court of equity on its own motion to dismiss the action on that ground. See

*Minnesota v. Northern Securities Co.*, 184 U. S. 199, 235.

Appellees cannot insist that we should have instituted these various remedies and depended upon their generosity to waive the technical defenses which they could have used against us had we endeavored along the lines suggested. The results of the litigation already contested show clearly to us that such a hope would have been quite illusive; for in every action where such defenses could have been waived, appellees have been diligent not to do so. For instance in *Lake v. Bonynge*, the facts showing the invalidity of *People v. Davis* could have been brought to the attention of the court and decided in that action, if appellees had seen fit to forego an objection to the evidence. When they do not see fit even to do this, how can they be heard

to insist that we should have continued our vain and fruitless efforts in order to preserve our rights from a claim of laches?

We have first pointed out that we were under no duty or obligation to appellees to institute any proceedings whatsoever; having the prior and superior right, we were entitled to rely upon it, until assailed by our adversaries. We have gone further and shown clearly, we think, that until the patent was issued to appellees in January, 1909, we were unable to proceed to an effectual assertion of our rights. That notwithstanding this ever since we first obtained knowledge of the judgment in *People v. Davis*, we have at all times insistently and without ceasing striven to overthrow what we believed a pernicious invasion of our rights without due process of law, or any showing of good faith whatsoever. That the only rights taken against us have been behind our backs, like a thief in the night, until we obtained knowledge of the attack made upon us, and that since that time we have been hampered and prevented from coming into the full measure of our rights by the ability of appellees to hide behind the State of California, until the patent issued.

### Section 32. Same.

#### *Facts Excusing Delay.*

If we have ever been under any duty to prosecute our claims against appellees, the litigation already

instituted is quite sufficient to excuse us from any such claim.

From the 1st day of October, 1900, to the present time, no hiatus of a single moment can be found in the constant endeavor of this plaintiff and his predecessor by some character of legal proceeding in the courts to have the appellant's right adjudged, claiming and asserting the invalidity of the judgment of People v. Davis. A large part of the time, more than one such proceeding were actually being so prosecuted.

This is all admitted by the appellees, but say they, the legal proceedings were not effectual, and therefore, having selected the wrong remedies, or taken the wrong procedure, you are in the same position, so far as the charge of laches is concerned, as though you had taken no steps whatever. The position they take is analogous to one where a wrongdoer is caught in the act of taking a horse from a barn under cover of the night, being pursued by the owner with a stick, making unsuccessful efforts to regain his property at every turn, which efforts are ineffectual because the wrongdoer is armed with the latest modern improved Winchester. Finally the owner arms himself with a more efficient weapon of modern make and again returns to the pursuit. The wrongdoer then loudly asserts that the pursuit must end because of the owner's laches, laches which occurred because of the ineffectual part of the pursuit with a club.

There must be something wrong here. It does not square with our sense of right and wrong. Wherein is this claim of defendants out of joint? The appellant owed appellees no duty of selecting the proper remedy, or taking the proper proceeding. It is a wrong-doing defendant's good fortune, in such proceeding, when the wrong remedy is selected or ineffectual proceedings are instituted, because he can avoid temporarily a trial on the merits, and postpone the just judgment of the law against his misdeeds. But by no possibility does his cause become just, and no punishment or penalty of laches is visited upon the plaintiff. Of course, a misdirected legal proceeding that misleads the opposite party may be urged as constituting laches because of the element which has misled. In all the proceedings in this controversy, the appellant in season and out of season, always, and under every condition and circumstance, has proclaimed that there was no service of summons in People v. Davis, and that the judgment therein was void. This was disclosed to the court that rendered the judgment and the court, by its solemn order, so adjudged. Any person seeing this record would know the facts, and would also there find an impartial declaration as to their legal effect by a lawyer, qualified to be superior judge. It was true that lapse of time had rendered the order void, but it did not make the judgment right, nor did it change the facts. Appellees deraign their title through this judgment, and the proceedings therein

had, and the facts therein stated were always within their knowledge. Knowing the facts they sought to make use of this void record to deprive appellant of his title, while plaintiff was ever asserting his right and protesting against this judgment. This protest took the form of an appeal from the order of the court of vacating the order setting aside People v. Davis, which appeal was prosecuted from 1901 until 1904.

However, on the very day that the order setting aside the judgment in People v. Davis was made, there was then pending in the same court a land contest for the same land, and appellant's predecessor on that very day filed a complaint in intervention thereon, again declaring against these appellees that the judgment in People v. Davis was a nullity, and that there had been no service of summons. At that time the decision in Youle v. Thomas by the Supreme Court had not been rendered. The intervenors did not have this light to act on, but again they asserted the invalidity of the judgment. The lower court, presumably yielding to the rule announced by Justice Shaw in Youle v. Thomas, that there was no warrant of law for such intervention, and that in a land contest case, the court had no jurisdiction to try and determine the rights of an intervener, sustained a demurrer to the complaint in intervention, without leave to amend. The court then proceeded to judgment between the other parties, ignoring the rights of the appellant. From this judgment appellant's predecessor again ap-

pealed to this court, and his appeal was finally decided in 1910.

But what is significant here the appellant in that proceeding urged the invalidity of the judgment in People v Davis and the superiority of the Davis certificate. While this appeal was pending, the State issued the patent to Mary Bonynge. But at this time, the State and Mary Bonynge both knew of the invalidity of the judgment in People v. Davis. Its invalidity had been asserted in the motion to set aside the judgment, and also in the complaint in intervention, in the contest of Moran v. Bonynge. So that Mary Bonynge took her certificate of purchase with full knowledge of its invalidity, and also with *knowledge of the facts*, which rendered that judgment void. It is so alleged in the complaint.

From the time of the issuance of this certificate to Mary Bonynge, there were outstanding two certificates of purchase for the same land. Before that time, certainly the holders of the rights under the Davis certificate owed nothing to Mary Bonynge, and as pointed out in the cases above cited, they owed no duty to the State to commence an action to set aside the judgment in People v. Davis, of which they knew nothing until the first day of October, 1900. There was no authority to sue the State, or any of its officers, for any such purpose, so as to bind the State. There was no way in which the judgment could be set aside without suit, except by motion, and the time to make the motion had

elapsed before the persons interested in the Davis certificate had discovered the existence of the judgment.

The statute, as construed by this court, was the measure and limitation of the rights under the Davis certificate. That statute not only fixed the rights of Davis, but also the rights of the State. It also declared the *policy* of the State with reference to the persons holding such contracts of purchase. If the law as enacted did not require more, the court cannot supply any seeming defects in the law, in order that the law may conform to the court's views of prudence or financial advancement of the State's interest. Judges have not always been leaders in business management or organization, and it is probably well that the policy of the State, as outlined by the statutory declarations be accepted by them. Equity therefore, has never undertaken to determine that a person is guilty of laches, when the rights of the party are given and limited by statute. To say under such circumstances that a party was guilty of equitable laches, while yet within his statutory rights, would be to condemn the statute. In other words, it would be to say that the statutory rule of diligence did not meet the equitable requirement of diligence. This would be nothing more than equity setting judgment upon the law.

During the years from the date of the judgment in People v. Davis, at least to the issuance of the certificate of purchase by Mary Bonynge, there was

no suit that was authorized against the State. The right to sue the State is a permission which the State must give and no such permission had been given. Furthermore, the holders of the Davis certificate knew nothing whatever about the action of the court in the case of People v. Davis.

Immediately upon the discovery of this judgment, one of the holders of the Davis certificate, sought to have that judgment vacated by motion. The motion was granted, and on the very day it was granted, the holders of that certificate intervened in a then pending contest for this land. The rule announced in Youle v. Thomas, 146 Cal. 539, had not then been announced. In the case of Youle v. Thomas, a land contest case was pending between Youle and Thomas. Eight other persons made application to purchase and for a reference of their right to purchase to the court for trial. This application was filed and reference to the court was granted by the Surveyor General. This fact was alleged in the complaint in intervention in that case. There was no evidence taken upon the complaint in intervention, yet the court in spite of this allegation in that case, used this language:

“Thereafter, eight other persons, by leave of court, filed complaints in intervention, each claiming as an applicant for the purchase of a particular tract of the half section, *whose applications and protest the Surveyor General had refused to receive and file.*”

The italics are ours and contain the erroneous statement. On petition for a rehearing, this inac-

curacy of statement was called to the attention of this court, and the petition for rehearing was denied. The denial of the petition for rehearing was probably authorized, because whether this statement of fact was true or not, it was not material to the decision rendered; the court adhered to the opinion rendered. That is to say, the decision held that the rights of third parties to purchase could not be litigated in a land contest pending, and therefore whether the Surveyor General did, or did not, make a reference of the claims of such third parties, was immaterial. Certainly if that fact had made any difference in the conclusion of the court, the court would have granted that rehearing and corrected its opinion accordingly. The case of Youle v. Thomas therefore, held that pending a contest, all third parties must keep out of the fight. They cannot procure a reference to the court which would authorize them to become a party to the contest.

As was said in the case of Youle v. Thomas,

"These conclusions are supported by previous decisions of this court. A similar question arose in Vance v. Evans, 52 Cal. 93. A second application by one of the parties had been filed after the order of reference was made. The court said: 'The only contests in respect to the right to purchase lands of which the district courts have jurisdiction are those which arise in the surveyor general's or register's office, and none had arisen in either of those offices concerning the defendant's second application.' In Berry v. Cammet, 44 Cal. 351, the court said: 'The sale of the lands of the

state is committed to the executive department of the government; and the judicial department has no jurisdiction of controversies arising between applicants for the purchase of the lands, except in such matters as are expressly provided for by that statute.' In *McFaul v. Pfankuch*, 98 Cal. 402, it is said: 'It is not a question that the plaintiff may litigate of his own mere volition. A preliminary step must be taken by invoking the action of the surveyor general, and the order of that officer referring the rights of the parties to the determination of the superior court is not only necessary to enable the plaintiff to invoke the action of the court, but without such order the court has no jurisdiction to hear or determine the rights of the parties.' In *Byrd v. Reichert*, 74 Cal. 582, the court says, with reference to this class of actions: 'When a court has acquired jurisdiction to hear and determine an action of the kind above referred to, it is evident that it can determine only such questions as are involved in the contest on which the action is based. It cannot determine as to other contests or other asserted rights, and in so far as it attempts to do so, its action, being beyond its jurisdiction, is void.' In *Mont Blanc C. G. M. Co. v. Debour*, 61 Cal. 364, the court, speaking of similar provisions of the federal statutes with relation to contests over the right to purchase lands from the United States said: 'The action is one in which those only who have filed claims to the land in the United States land office could properly be made parties to the action, which was brought for the sole purpose of determining the rights of possession between such adverse claimants.' It has been held that after a contest has been referred to the courts for determination, and an action has been begun, the officers of the state are divested of further power with reference to the proposed sale, and

cannot receive subsequent applications. (Lau-  
genour v. Shanklin, 57 Cal. 70; Cunningham v.  
Shanklin, 60 Cal. 125; Wrinkle v. Wright, 136  
Cal. 496.)”

This contest of Moran v. Bonynge was pending from 25th day of July, 1900, to the 19th day of May, 1908, in the Superior Court of Kern County. Under the rule announced in Youle v. Thomas, the holders of the Davis certificate, could not be heard in this contest. Furthermore, it was not, and could not be known which of these persons, if either, would prevail in that contest, until the decision of the court in that contest. In that contest, however, the holders of the Davis certificate did all they could to be heard. They filed their petition in intervention, alleging the facts of the invalidity of the judgment in People v. Davis. This was considered a proper proceeding by all parties. Demurrs were filed and considered by the court, and answers filed by the parties. Finally, however, the rule in Youle v. Thomas was brought to the court’s attention, and without further ado, the demurrer was sustained without leave to amend. This was no doubt, proper under the case of Youle v. Thomas, because the interveners had no right to be heard in the case at all. However, if they had such right to be heard, the denial of the right to amend was arbitrary and unjust. An appeal was prosecuted by the interveners, and was pending until 1910 when the court affirmed the judgment. Yet the court, speaking by the same justice, who had written the opinion

in Youle v. Thomas, did not affirm the judgment upon the rule of Youle v. Thomas, but went into an elaborate analysis of the complaint in intervention to show its insufficiency, although the court had held in Youle v. Thomas that whether sufficient or insufficient, the court could not entertain it. When the opinion was read by the judge of the Superior Court, who had sustained the demurrer without leave to amend, he frankly stated that he had denied the privilege to amend because of Youle v. Thomas, and that he would not have denied the right to amend if he had any idea that the Supreme Court would not have adhered to the rule announced in Youle v. Thomas. We confess now that it is uncertain, in the light of the opinion in Youle v. Thomas, and the case of Moran v. Bonynge, what the rule is with reference to a right of intervention in a land contest case.

In this contest, there was no adjudication of any person's rights under the Davis certificate; so there was no res judicata if an intervention was authorized.

But there was an honest and persistent effort made to have the relative rights of the two certificates adjudicated. This was defeated by the holders of the Bonynge certificate, invoking the rule in Youle v. Thomas, in the lower court. This intervention continued from the 31st day of December, 1900, to the 20th day of March, 1910; for more than four years of this same time at the beginning, pro-

ceedings were pending in People v. Davis and for more than one year of this same time, at the end, there was the suit of Lake v. Bonynge. In all this litigation, the holders of the Davis certificate were urging their rights and constantly crying out the facts showing lack of jurisdiction in People v. Davis. The motion to vacate the judgment was defeated, substantially upon the grounds that the motion came so late that the court could not hear the evidence, a wrong remedy adopted to effect the purpose. Again urging their rights, and still crying out the facts, showing lack of jurisdiction in People v. Davis, the holders of the Davis certificate intervened in Moran v. Bonynge, was again defeated upon the grounds that the facts of the invalidity of the judgment could not be inquired into because there could be no intervention in a land contest, a wrong remedy to effect the purpose. Again in Lake v. Bonynge, the plaintiffs there crying out the facts, showing lack of jurisdiction in People v. Davis, actually produced the evidence and the court refused it consideration, upon the objection thereto of defendants, because to do so was a collateral attack on a judgment. Again a wrong remedy.

It is admitted that as soon as the patent issued, the suit of Lake v. Bonynge was commenced. In that suit the court held that the issue as to the validity of the judgment in People v. Davis could not be determined, *as against the objection* of the de-

fendants. It is well settled that it could have been so determined in the absence of such objection (*Hill v. City Cab Co.*, 79 Cal. 191; *People v. Harrison*, 107 Cal. 541). It was therefore the objection of appellees to the consideration of the evidence which prevented the determination of the invalidity of the judgment in *People v. Davis*; that is to say, the action was proper to determine the issue, provided the defendants did not object. Defendants objected under those pleadings to the determination of the validity of the judgment in *People v. Davis*, after the evidence was actually before the court, and because of that objection, the lower court and Supreme Court on appeal refused to declare the invalidity of that judgment. Can a litigant stand by with the election in his keeping to have a fact determined, or not determined, and elect not to have the fact determined, and then charge laches to the other party for not so framing the proceeding that he shall be compelled to submit the fact for determination. This would indeed, be a queer scale in which to weigh equity. The lapse of time in such case results from the action of the party who is alleging that such lapse of time has injured him. The doctrine of laches is not of this flimsy material. It must be that an unavoidable injury or wrong has resulted because of the lapse of time; that is to say, the party charged with laches must have in his keeping some duty to proceed, which would have given the other party an opportunity to try the fact in dispute, but when the opportunity is fur-

nished and such party deliberately prevents the trial on the facts, he cannot claim laches.

As already outlined, it was not necessary that we should have been in possession of, or should have adopted a remedy adequate to the needs of our full success; it is sufficient if the remedy pursued gives notice to the adversary that he will not be permitted to enjoy the right litigated without a determination that he is entitled to do so by a judicial tribunal constituted for that purpose.

Thus, it is said in

Duke v. Turner, 204 U. S. 623:

"These facts do not disclose any laches in the assertion of their rights such as would bar the right to obtain a writ of mandamus, nor does it appear that the municipal corporation has been in any wise prejudiced by the delay. In some form, legal warfare seems to have been waged for the collection of these warrants by various holders in different courts without beneficial results until the present action."

So it is said in

16 Cyc., 175,

"Delay pending other proceedings has frequently been held excusable not only where the termination of such proceedings were necessary for the ascertainment of the facts involved in the later suit, but also where the former suit had a similar object but proved unavailing."

Likewise in

5 Pomeroy's Equity Jurisprudence, page 60, it is said:

"The pendency in the same or in another jurisdiction of a suit relating to the subject-matter is generally regarded as an excuse for delay until its termination; provided, however, this other suit is prosecuted with due diligence. Such a condition may arise when the complainant seeks the wrong jurisdiction or the wrong remedy in the first instance."

Graham v. Day, 9 Ill. (4 Gill.) 389-394, deals with a state of facts quite like this case. There a motion was made to set aside judicial sale and after pending for a few years was finally decided adversely to the motion; just as in the case at bar, the appellant moved in the original cause to vacate the judgment and the proceeding was finally decided adversely to him in 1904. In that case, after the proceedings on motion had been finally concluded, a separate suit was instituted to obtain the relief sought and the plea of laches was interposed as a bar. In denying the sufficiency of such defense, the court uses the following language:

"The most plausible ground of defence is, that the complainants are barred by the lapse of time from obtaining the relief sought, more than five years intervening between the sale to Hoes and the filing of this bill to vacate it. If this long delay was not satisfactorily accounted for, the objection would probably be a fatal one. Such a sale is not absolutely void, but may be avoided by the injured party. He is at liberty to treat the sale as valid or invalid, but he ought to make his election within a reasonable time after he is informed of the irregularity. If he does not manifest his intention to take advantage of the irregular sale by the com-

mencement of proceedings within a reasonable time, to vacate it, he will be deemed to have renounced his right to do so. But the circumstances of this case, when properly understood, do not show any want of diligence on the part of the complainants, who are the judgment creditors of Day, in the assertion of their rights. \* \* \*

"The complainants made their motion to set aside the sale during the fall of 1842, and have been zealously engaged ever since in endeavoring to accomplish that object. They filed this bill immediately after the final decision against them on the first application. In the opinion of the court, they have not been guilty of any laches in the prosecution of their rights."

Russel v. Dayton etc. Co., 70 S. W. (Tenn.) 1, decides that the prosecution of an inefficient remedy is sufficient to excuse delay, as appears from the statement contained in the following syllabus:

"Plaintiff's decedent was killed December 20, 1895, and thereafter an action was brought in the federal court for his alleged wrongful death, and to set aside an alleged fraudulent release. The suit was pending in the federal court until September, 1900, when it was held that that court had no jurisdiction to determine the validity of the release, whereupon, on November 1, 1900, a bill was filed in the state chancery court to set such release aside. Held, that plaintiffs had not been guilty of such laches as would bar their right to relief."

Russell v. Russell, 129 Fed. 434, also holds that delay in suing to set aside an agreement has been excused pending an unsuccessful suit for the reformation of such agreement.

We would therefore conclude that where the complaining party, as in this case, at all times from the discovery of the wrongs sought to be perpetrated upon him, seeks redress in the courts of justice and litigates continually and in good faith, at all times asserting his rights to the property in dispute, no plea of laches can be urged against him because perchance he may have chosen the wrong remedy and is compelled, after objection upon the part of the defending party, to begin his litigation anew. So far as the principles of equity are concerned, requiring good faith, diligence and the serving of due notice upon the adverse party in order that he may not be at any time misled to his injury, any litigation which discloses to the defending party the purpose of the complaining party to assert his rights and regain his property, is just as efficient and effective as if the litigation had been correctly and accurately conceived in point of law and technical rule, even though such litigation, for technical reasons may fall short of its purpose and afford the defending party a temporary success. This is obviously true for the simple reason that the delay in such case is caused primarily by the defending party himself, and cannot therefore operate in his favor, as might be the case if the negligence and delay were imputable to the complaining party. Whenever a defending party prevails against a complainant on the ground that the action was misconceived or was an inadequate or an inefficient remedy for the purposes of the complainant's case,

he does so at the price and upon the implied condition that the complainant shall be permitted to assert his rights in a new and technically correct proceeding. The principle of fundamental justice here relied upon found expression even in common law pleading which required every plea in abatement to state the facts which would give the plaintiff a true writ. So in this litigation when appellees saw fit to claim the benefits of the technical objection to the scope of the pleadings, they cannot complain of the delay it caused.

All the cases cited by appellees to support their contention that the choosing of the wrong remedy does not prevent the delay from operating as laches, are those cases wherein the remedy adopted was not sufficient to disclose the purpose of the plaintiff to assert the rights claimed in the subsequent action, or are cases which fail to note the distinction between those prior remedies which seek to enforce the same right involved in the subsequent action and those which do not seek to enforce such right.

In addition to the authorities cited in our opening brief in support of the proposition under consideration, we desire to cite the following, each of which decides clearly and unequivocally that bona fide litigation though misconceived and therefore inefficient, is sufficient to prevent a defense of laches when the true remedy is prosecuted:

Gunton v. Carroll, 101 U. S. 426, 429;  
Gilmer v. Morris, 43 Fed. 456, 460;

Frevert v. Bayonne, 63 N. J. L. 202;  
Johnson v. Diversey, 82 Ill. 446.

In this action appellees have also sought to urge that under the peculiar facts in this case, the plea of laches is to be favored, particularly because they allege the property has increased in value since the issuance of the Bonynge certificate. There is not a single fact or inference in the entire record which would authorize the court in concluding that the land in controversy was one cent more valuable today than at the time the Bonynge certificate was issued. It is argued, however, that in view of the fact that it appears to be mineral producing land, the court will take judicial knowledge of the fact that it is more valuable now than at the time the appellees acquired their alleged right therein, and that such value is due to the efforts of appellees. The mere statement of such a conclusion is sufficient to refute its soundness, and this court cannot take judicial notice of the time when oil was discovered in Kern County or whether it was discovered upon this tract at any particular time or whether the discovery of oil upon this tract was made before or after the certificate to Mary A. Bonynge was issued in 1900, or whether at the time Mary A. Bonynge received her certificate the land was recognized as valuable, and if so, whether the value at that time was less or greater than its value at the present time. Neither can any authority whatsoever be produced to the effect that the courts will take judicial notice of the fact that it requires the expenditures

of large sums of money to make petroleum bearing lands valuable. In the first place such a statement is not necessarily the fact, and if it were the fact it is not one of which the court can take judicial notice. Discovery of oil upon adjoining claims by either little or much labor might or might not render the property in dispute exceedingly valuable without the expenditure of a single cent on behalf of appellees, and a mining of oil lands adjoining those in controversy might deplete the value of the land in suit in spite of any effort whatsoever on behalf of appellees or anyone else. To ask this court to take judicial knowledge of these things in the absence of a record is to ask the court to take judicial knowledge of the private affairs of a particular litigant and decide accordingly in the absence of a record. Such a position, we submit, cannot be argued with patience.

Taking it for granted that the land in controversy has increased exceedingly in value and that such increase in value has in a great part been due to the efforts of appellees. Notwithstanding such facts, even if they were true, under the particular facts of this case they are not sufficient to constitute any defense of laches because ever since the certificate was issued to Mary A. Bonynge the owners of the Davis certificate have at all times resorted to the courts of this State and upon due summons and legal notice and through many pleadings and various forms of evidence have given notice each

and every day and at all times that they regarded themselves as the true and lawful owners of the land in controversy and were prosecuting with the best diligence known to them, their rights in the courts of this State. In the light of these facts, if appellees saw fit to expend sums of money and develop the lands in dispute, they did so at their peril and will not now be heard to say that they did so relying upon the inactivity and the failure of appellant to assert his rights.

Assuming the statements in regard to the value of the property and the expenditure of money to be true, such expenditures were made in defiance of appellant's rights and in disregard of what the courts might ultimately decide to have been his rights, and must not, therefore, under any equitable principle of laches or upon any basis of common justice, be regarded as excuse for preventing appellant in this case from receiving the full measure of his rights.

### **Section 33. Same.**

#### *Statute of Limitations.*

In view of the fact that the suit is purely equitable in its nature the statute of limitations of this State can not be considered as binding and is followed only by analogy.

Kirby v. Lake Shore etc. Co., 120 U. S. 130.

For the reasons herein stated, we conclude that the judgment of the District Court should be reversed.

Respectfully submitted,

JAMES F. PECK,

WALTER D. COLE,

CHARLES C. BOYNTON,

WALTER SHELTON,

*Solicitors for Appellant.*

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No. 2207.

IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

Judd E. Carpenter,

*Appellant,*

*vs.*

M. J. & M. & M. Consolidated, a  
corporation, et al.,

*Appellees.*

BRIEF ON BEHALF OF APPELLEES.

Statement and Refutation of Certain Unwarranted  
Assumptions of Appellant.

(All italics, unless otherwise noted, are ours.)

The bill was filed December 30, 1911. Appellant predicates his claim to a one-sixth interest in section 36, township 12 north, range 24 west, San Bernardino base and meridian, situate in Kern county, California, and which was "school land" owned by the state of California, on a certificate of purchase issued by the state March 20, 1889, to one S. Davis, who, on or about April 1, 1890, assigned the certificate to one Charles

H. Gilman. Davis, prior to the issuance of the certificate of purchase and as a condition precedent to its issuance, had paid the state twenty per cent. of the purchase price of the land and one year's interest in advance. The annual installments of interest which became due, in advance, January 1, 1890, 1891 and 1892, being delinquent and unpaid, August 25, 1892, an action was commenced in the superior court of Kern county, entitled The People of the State of California v. S. Davis, wherein the court was asked to render judgment foreclosing all the interests of Davis in and to the certificate of purchase and to cancel and declare the same barred and to foreclose all equity of redemption of defendant. [Tr. pp. 24, 40, 44.] It is not alleged or pretended that any notice of the assignment from Davis to Gilman was filed with the register of the state land office at any time; and it is provided in section 3552 of the Political Code of California that "A judgment against the purchaser binds the assignee, "unless the notice of the assignment was filed with the "register before the commencement of the action." On the day the complaint was filed a summons was issued [Tr. pp. 24, 44, 46] which was placed in the hands of the sheriff of Kern county August 27, 1892, who, August 30, 1892, made his return that "after "due search and diligent inquiry, I have been unable "to find the within named defendant, S. Davis, in "Kern county." [Tr. p. 46.] September 6, 1892, an affidavit for an order of publication was filed [Tr. pp. 26, 46, 48], and an order for service of the summons by publication made. [Tr. pp. 25, 48-49.] December

29, 1892, affidavit of publication of the summons was filed showing that it had been published in the "Kern County Echo" for ten consecutive weeks. [Tr. pp. 25, 49-52.] December 27, 1892, the default of the defendant was entered by the clerk and judgment rendered by the court foreclosing and annulling the Davis certificate of purchase. [Tr. pp. 25, 53-55.] January 4, 1893, a certified copy of the judgment was filed in the office of the register of the state land office, and January 16, 1893, a certified copy was filed in the office of the county recorder of Kern county. [Tr. p. 26.] January 22, 1899, appellee, Mary A. Bonynge, made application to purchase the land from the state, which was approved, and January 23, 1900, a certificate of purchase for the land described in the Davis certificate was issued to her. [Tr. pp. 69, 72, 79, 89.] July 25, 1900, Thomas L. Moran, who had made application to purchase the south half of said section 36, commenced an action in the superior court of Kern county against Mary A. Bonynge, claiming the right to have the respective rights of the parties to purchase the land determined. [Tr. pp. 30, 68-76.] All of the above recited proceedings appeared on the official records in the offices of either the surveyor-general and register of the state land office, the county clerk of Kern county, or the recorder of that county. *October 1, 1900, Davis, Gilman and Fred W. Lake acquired and had actual notice and knowledge of all of said proceedings.* [Tr. pp. 25, 26, 58, 61, 63.] December 7, 1900, Gilman assigned to said Lake an undivided one-half interest and to one H. H. Snow an undivided

one-fourth interest in the Davis certificate of purchase. [Tr. pp. 17, 57.] December 14, 1900, Lake "as assignee, by mesne transfers and conveyances of S. 'Davis,'" gave written notice that he would move to vacate the judgment of December 27, 1892, and "to quash the pretended service of summons," upon the ground that the judgment was void and entered without authority of law, and that the court never acquired jurisdiction over the person of Davis; that neither the affidavit nor order for the publication of summons complied with the provisions of the law of the state, and were fatally defective, and that all of the proceedings in said action were null and void. [Tr. pp. 27, 55.] December 28, 1900, Lake filed a further notice of motion [Tr. pp. 27, 56-63], and in support of his motion the affidavits of himself, Gilman and Davis. [Tr. pp. 27, 56, 60, 62.] December 31, 1900, the motion of Lake was granted, and the court made its order purporting to annul, vacate and set aside its judgment of December 27, 1892. [Tr. pp. 27, 63.] And on that day an order was made in the action of Moran v. Bonynge granting Gilman, Snow and Lake leave to file a complaint in intervention, which was thereupon filed. [Tr. pp. 31, 76, 77, 82.] It is alleged in the bill that the claimants under the Davis certificate in 1900 tendered to the county treasurer the amount then due and owing for interest on the purchase price together with the cost of the action in The People v. Davis, and demanded that the same be credited and endorsed upon the certificate of purchase, but that the county treasurer refused to accept the payment or make the endorsement. [Tr. p. 29.]

October 21, 1901, the district attorney of Kern county gave notice that he would move the court to set aside the order made in People v. Davis, December 31, 1900, purporting to vacate and annul the judgment of December 27, 1892, which motion was granted December 11, 1901, [Tr. pp. 30, 65-67] from which order an appeal was taken by Davis to the supreme court of California, with the result that the said order was affirmed June 23, 1904. [Tr. p. 30; People v. Davis, 143 Cal. 673.]

July 28, 1907, Mary A. Bonynge answered the complaint in Moran v. Bonynge. [Tr. p. 32.] December 28, 1907, an amended complaint in intervention was filed in that action by Gilman, Lake and Snow [Tr. p. 32], to which the defendant demurred, and the demurrer was sustained January 13, 1908, without leave to further amend. [Tr. p. 33.] May 19, 1908, judgment was entered in said action awarding the right to purchase the land there in controversy to Mary A. Bonynge, from which judgment Gilman, Snow and Lake appealed to the supreme court of California [Tr. p. 33]; that court affirmed the judgment February 7, 1900. [Tr. p. 33; Moran v. Bonynge, 157 Cal. 295.]

January 25, 1909, the state issued its patent for said section 36 to Mary A. Bonynge. [Tr. p. 22.] March 1, 1909, Lake and Snow commenced an action in the superior court of Kern county against Mary A. Bonynge and John Doe, to obtain a judgment declaring that the defendants held the naked legal title to the lands conveyed by the patent in trust for the plaintiffs, and to make such decree to protect the heirs,

devisees and collateral kindred of Charles H. Gilman [who, it is here alleged, died intestate at San Francisco, California, January 17, 1909, Tr. p. 18], as might be consistent with equity [Tr. pp. 34, 92-97], to which complaint Mary A. Bonynge and W. A. Bonynge filed their answer March 9, 1909. [Tr. pp. 34, 98-111.] June 1, 1909, judgment was entered in said action in favor of defendants, from which Lake and Snow appealed to the supreme court of California, which affirmed said judgment October 9, 1911. [Tr. p. 34; *Lake v. Bonynge*, 161 Cal. 120.]

As has been stated, Gilman died intestate January 17, 1909. After his death certain of his heirs transferred and conveyed all their rights and claims under the Davis certificate and the land described in it to one W. G. Deal; and prior to August 9, 1910, by a partial decree of distribution, made in the matter of the estate of said Gilman by the superior court of the city and county of San Francisco, all of the interest (one-sixth) of said heirs of Gilman in said certificate of purchase and said land had been distributed to said Deal, who, August 9, 1910, conveyed said one-sixth interest in the land and certificate to appellant, Judd E. Carpenter. [Tr. p. 19.]

As has been noted, the bill in this suit was filed December 30, 1911. Thereafter all the defendants demurred on the ground that the bill was without equity, that appellant was barred by laches and the statutes of limitations; that the institution of said suit by the people of the state of California against said Davis and the proceedings therein were a bar to this suit; that

the institution of said suit by Thomas L. Moran against Mary A. Bonynge and the intervention therein of said Charles H. Gilman and the proceedings in said action, as alleged in the bill, were a bar to this suit; that the institution of said suit by Fred W. Lake and H. H. Snow against Mary A. Bonynge and another and the proceedings therein, as alleged in the bill, were a bar to the maintenance of this suit. [Tr. p. 120 *et seq.*]

October 18, 1912, an order was entered pursuant to the directions of Hon. William C. Van Fleet, district judge, sustaining the demurrers and ordering the bill dismissed. [Tr. pp. 138-139.] October 23, 1912, a final decree was entered dismissing the bill at the cost of complainant [Tr. pp. 142-143]; to reverse which appellant is prosecuting this appeal.

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Appellant asserts that this suit was commenced to vacate and set aside the judgment in People v. Davis, and that "the complaint concludes with a prayer that "the judgment in People v. Davis be set aside, vacated "and annulled" (brief, p. 9); and the whole argument of appellant is bottomed on this theory. But this claim is not supported by the record. Conceding that under the decision in People v. Davis, 143 Cal. 673, the judgment is impervious to collateral attack, appellant argues the case on the assumption that he, by this action, seeks to have that judgment vacated. A cursory examination of the bill will suffice to show it is not true, as stated by appellant, that "the first and dominant purpose of this action is to vacate, set aside and annul "People v. Davis; the facts showing entire want of

“service either actual or constructive, are set forth in “the complaint, and the prayer of the complaint asks “specifically that the judgment in People v. Davis be “set aside.” (Brief, p. 9.) The bill contains no prayer that that judgment be vacated or set aside. The only relief asked, other than for an injunction and accounting, is that it be declared that appellees hold the legal title to this land in trust for appellant and that they be required to execute conveyances thereof to him. [Tr. pp. 37-39.] It is apparent, therefore, that the object of the suit is to declare and enforce a trust and not to set aside the judgment of foreclosure. The claim of appellant, as disclosed by the allegations of his bill, is the same as that made by Lake in People v. Davis, viz., that the judgment in that case is absolutely void, a mere nullity constituting only a cloud upon the title, and that, therefore, it was not necessary to institute a suit to obtain a vacation of the judgment. The fact that the supreme court of California directly held that the judgment was not void and subject to collateral attack (143 Cal. 673) apparently failed to impress the draftsman of this bill with any idea that the claim made by Lake on his appeal, and repudiated by the supreme court of California, was of doubtful validity. We reiterate that this is a suit to declare and enforce a trust and not to annul or set aside the judgment. Under appellant’s theory that the judgment is void, he treats it as so much waste paper, and, upon that assumption it, of course, was unnecessary to have the judgment set aside. It is plain, therefore, that the theory advanced by appellant here is not supported by his pleading.

Another error and groundless assumption of appellant is that Davis, upon the issuance of the certificate of purchase, and Gilman, upon its assignment to him, became vested with the *title* to the land. Nothing could be further from the truth. While the certificate of purchase, so long as it remained valid and outstanding, was by statute declared to be *prima facie evidence of title*, it conveyed no title. It was merely an executory contract of sale. In *Taylor v. Weston*, 77 Cal. 534, it is so held, the court saying:

“In the case before us the person through whom the respondent claims had only a contract of purchase. It is undisputed that the legal title is in the state, the very object of the proceeding being to determine who is entitled to a conveyance from the state. What is called a certificate of purchase (although treated as evidence of title as between third parties), is, as against the state, merely evidence of a contract to convey. And the respondent must establish his right against the state, each party in this kind of proceeding being an actor. (*Dillon v. Saloude*, 68 Cal. 269.)”

77 Cal. 540.

Again, it is not true, as claimed by appellant (brief, p. 38), that all that was decided in *People v. Davis*, 143 Cal. 673, is “that that judgment was fair on its “face and nothing more.” In *Lake v. Bonynge*, 161 Cal. 120, the supreme court of California had occasion to, and did, interpret its decision in *People v. Davis*. In speaking of appellant’s contention there made that the court in *People v. Davis* “merely determined that “Davis (or his successor in interest Lake, one of the

“plaintiffs here) could not move to set aside the judgment more than one year after its entry unless the judgment was void on its face,” and that “It did not determine the question whether or not the court had acquired jurisdiction of the person of Davis,” the court declared:

“But in this assertion we are satisfied that counsel is in error, and that the very question which was determined, and which was the essential point involved on the appeal, was whether the original judgment entered against Davis was or was not valid. The appeal which was taken from the order of November 11, 1901, vacating the order of December 31, 1900, which had set aside the judgment against Davis, may have involved incidentally the question whether the order setting aside the original judgment was invalid because application therefor had not been made within a year after its entry (Code Civ. Proc., sec. 473), but it involved principally the question whether the order could be supported on the ground asserted by appellant on that appeal,—namely, that an inspection of the judgment-roll showed on its face that the judgment was invalid.”

161 Cal. 125.

The court then stated the facts as they appeared in the record on the appeal of Lake in *People v. Davis*, and after quoting from its opinion in that case the court further said:

“From this quotation as to what was decided in that case it appears clearly that the pivotal question upon which the validity of the order under review in

the Davis appeal turned was whether the judgment-roll showed that the trial court had acquired jurisdiction of the defendant. It was held that it had and such decision is *res adjudicata*. Under this decision the *status* of the judgment as a valid one was settled forever as against any collateral attack upon it by the parties to the appeal or their privies."

161 Cal. 127.

The facts stated in the bill refute appellant's claim (brief, p. 58) that the claimant under the Davis certificate of purchase "had a right at all times to assume "that the holder of the second [Bonynge] certificate "was claiming in subordination, not in hostility, "and no duty devolved on him to commence any "action." The statement is preposterous in view of the facts that after the issuance of the Bonynge certificate, Gilman, Lake and Snow asserted in their complaint in intervention in Moran v. Mary A. Bonynge, filed December 31, 1900, [Tr. p. 79] eleven years prior to the filing of the present bill, that Mary A. Bonynge "claims to own the said land under and "by virtue of a certain certificate of purchase of date "January 23d, 1900, and numbered 14734, issued to "her in pursuance of her application to purchase the "said land, dated July 22d, 1899; \* \* \* But these "intervenors say that said certificate of purchase was "unlawfully and improvidently issued to said defendant, and constitutes a cloud upon the title of these "intervenors, and each of them, in and to the said "lands and premises"; that thereafter the people of the state of California obtained an order vacating and

annulling the order of December 31, 1900, made on Lake's application, purporting to set aside and declare void the judgment of foreclosure in People v. Davis; that Mary A. Bonynge's demurrers to the original and amended complaints in intervention of Gilman, Lake and Snow were sustained, and that when she, in Moran v. Bonynge, was, by the final judgment, awarded the right to purchase the land, Gilman, Lake and Snow took an appeal.

Appellant (brief, p. 22) cites and quotes from the opinion in People v. Mulcahy, 159 Cal. 34, as a case in point. He omits, however, to inform the court that the action was commenced after the amendment of subdivision 1 of section 670 of the Code of Civil Procedure in 1895, as clearly appears from the following excerpt from the opinion:

“This case differs from People v. Davis, 143 Cal. 675 [77 Pac. 651], in the fact that subdivision 1 of section 670 of the Code of Civil Procedure is applicable here as it has stood since the amendment of 1895, and we are permitted to consider the affidavit for the publication of summons and the order directing publication.”

159 Cal. 35.

Again, (brief, p. 85) the statement that there is not a fact or inference in the record which would authorize the court in concluding that the land in controversy is more valuable today than at the time the Bonynge certificate was issued is a gratuitous assumption. Davis made application for the purchase of the land in 1888,

stating that it was unsuitable for cultivation. As shown by the pleadings in Moran v. Bonynge, Mary A. Bonynge applied to purchase the land alleging that it was unsuitable for cultivation, while Moran in his application to purchase the south half of the section maintained that he was an actual settler and that the land was suitable for cultivation. There is no fact alleged from which any inference can be drawn that any of the parties at that time knew the land was mineral land containing valuable deposits of petroleum oil. It is charged in the bill that the one-sixth interest in the land claimed by appellant is now of the value of one million dollars. These facts would seem to make it certain that the land was more valuable when this suit was instituted than when the Bonynge certificate of purchase was issued.

#### **Contentions of Appellees Stated.**

The points of appellees in support of the decree of the court below, briefly summarized, are:

- I. IN DETERMINING QUESTIONS AFFECTING THE TITLE TO REAL PROPERTY THE FEDERAL COURTS ARE GOVERNED BY THE LAWS OF THE STATE IN WHICH THE LAND IS SITUATED; AND, AS TO THE CONSTRUCTION OF APPLICABLE STATE STATUTES, AS WELL AS THE EFFECT OF DECREES AND JUDGMENTS OF THE STATE COURTS, ARE CONTROLLED BY THE DECISIONS OF THE HIGHEST COURT OF THE STATE.

2. THE BILL IS WITHOUT EQUITY, MAKES A COLATERAL ATTACK ON THE JUDGMENT IN PEOPLE V. DAVIS, CONTAINS NO SHOWING OF A MERITORIOUS DEFENSE, AND UTTERLY FAILS TO STATE ANY GROUNDS ENTITLING APPELLANT TO EQUITABLE RELIEF.

3. APPELLANT IS BARRED FROM MAINTAINING THIS SUIT BY THE LACHES OF GILMAN, HIS PREDECESSOR IN INTEREST, AND THE STATUTES OF LIMITATION.

(A) It affirmatively appears from the statements of the bill that the judgment foreclosing the Davis certificate of purchase was rendered nineteen years before the filing of the bill; that Gilman acquired actual notice of its rendition and of the defect in the proceedings for publication of summons more than eleven years prior to the institution of this suit, and Gilman and appellant at all times, and for nineteen years, have had constructive notice from public records of the same facts, and knowledge of circumstances more than sufficient to put a reasonable person upon inquiry as to the existence of the irregularities appellant now claims to exist. (B) The facts that the right of third parties have intervened, that oil has been discovered and developed, and that the land has greatly increased in value, that the appellant and his predecessor in interest stood by and speculated upon such increase:—all combine to make it plain that the bill is without equity, and that the laches of appellant and his predecessor in interest has prejudiced appellees. (C) Unavailing efforts to obtain relief by a resort to improper remedies constitute no ground of excuse for appellant's laches. (D) The failure of claimants under the Davis certifi-

cate to prosecute available legal and equitable remedies constitutes such laches as precludes the appellant from maintaining this suit. (E) The judgment in People v. Davis is not void, and the owner of the Davis certificate could not indefinitely delay his attack on it on the theory that it constituted a mere cloud on his title. (F) The California statutes of limitation are applicable and bar this suit.

4. PEOPLE v. DAVIS, 143 CAL. 673, IS RES ADJUDICATA AS TO ISSUES RAISED BY APPELLANT.

(A) Federal courts are required by the constitution of the United States and acts of Congress to give full faith and credit to judgments of state courts. (B) A judgment of a state court rendered upon constructive service on a *resident* defendant, who is at the time within the state, and is served in compliance with the local laws, is a valid judgment everywhere, and entitled to full faith in the courts of sister states and in the federal courts. (C) A judgment of a state court which holds that jurisdiction was in fact made upon *resident* citizens by constructive service is *res adjudicata* in a federal court. (D) People v. Davis, 143 Cal. 673, holds that the defendant in that case, Davis, was legally served with process of the court; that the court acquired jurisdiction over his person; and that the judgment foreclosing and cancelling the Davis certificate of purchase is a valid judgment, and this ruling is binding on this court. (E) Davis was a party to the judgment in People v. Davis, 143 Cal. 673, and, as appellant, Carpenter, claims only under Davis by mesne convey-

ances, he is in privity with him and is bound by the judgment there rendered.

6. LAKE AND SNOW v. BONYNGE, 161 CAL. 120, IS ALSO RES ADJUDICATA OF THE ISSUES RAISED HEREIN.

### **POINTS, AUTHORITIES AND ARGUMENT.**

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**In Determining Questions Affecting the Title to Real Property, the Federal Courts are Governed by the Laws of the State in Which the Land is Situated; and, as to the Construction of Applicable State Statutes, as Well as the Effect of Decrees and Judgments of the State Courts, are Controlled by the Decisions of the Highest Court of the State.**

The controversy here involves, solely, the effect to be given to the judgment of a superior court of the state of California foreclosing the rights of a purchaser under an executory contract for the sale of lands belonging to the state. Every act under consideration was taken by the officers of the state pursuant to, and in supposed compliance with, the statutes of California providing for the sale of its lands and the manner in which the rights of the holder of a certificate of purchase might be forfeited and foreclosed. Plainly no question could more clearly be a matter of local law than one arising under the statutes of a state governing the manner in which title to its lands may be acquired by purchase and the effect and validity of judgments forfeiting the rights of delinquent purchasers. The pertinent statutory proceedings have regard to applications to purchase, approval of applica-

tions, payment of twenty per cent. of the purchase price and interest upon the balance for one year in advance, the issuance of certificates of purchase, the payment of interest annually on the balance of the purchase money, the publication of a delinquent list, actions in a superior court to foreclose and forfeit the rights of the delinquent holder of the certificate of purchase, the resale of the land after foreclosure, final payment for the land, and the issuance of a patent conveying the legal title to the purchaser. The several steps which by statute are required to be taken in the sale of and acquisition of title to state lands, the force and effect to be attributed to the acts of the officers of the state, including the validity of judgments of foreclosure and the results to follow from such judgments, are all subjects within the exclusive province of the state and controlled by its statutes and the decisions of its courts. Every question involved here concerns the interpretation and application of the statutes of California and the effect to be given to judgments of its courts in such cases.

It scarcely requires the citation of authority to support the proposition that the construction by a state court of last resort of the statutes of the state relative to titles and conveyances of real estate is controlling and binding on the federal courts; and this principle is peculiarly applicable where the questions relate to the sale by the state of its own land. But some of the pertinent authorities may be profitably noticed.

In Polk's Lessee v. Wendal, 9 Cranch. 87, Chief Justice Marshall said:

"In cases depending on the statutes of a state, and more especially in those respecting titles to land, this court adopts the construction of the state where that construction is settled, and can be ascertained."

9 Cranch 98.

In M'Keen v. Delancy's Lessee, 5 Cranch. 22, the great Chief Justice held that in construing a statute of a state concerning lands, the court would adopt the construction settled in the state courts though not in accordance with its own opinion, saying:

"But, in construing the statutes of a state, on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the state;

\* \* \* \* \*

"On this evidence the court yields the construction which would be put on the words of the act, to that which the courts of the state have put on it, and on which many titles may probably depend."

5 Cranch. 32, 33.

In Hibben v. Smith, 191 U. S. 310, it was held that whether a judgment of a state court based on an assessment is void or only voidable because some of the members of the board were residents of, and taxpayers in, the assessment district was a proper question for the state court to decide, and after the highest court of the state has held that the judgment is not void and cannot be attacked collaterally the supreme court of the

United States would follow that determination; the court saying:

“Whether a judgment obtained in a case like this, where two members of a general board created by statute for the purpose of making it, had some interest in some of the property subject to the assessment, was a void or voidable judgment, is a proper question for the state court to decide. A state court has the right to place its own construction upon its own judgments, and where, as in a case like this, it holds that the judgment is not void and that it cannot be attacked collaterally, we ought to follow that determination. *Newport Light Co. v. Newport*, 151 U. S. 527, 539.”

191 U. S. 324-325.

In *Seefeld v. Duffer*, 179 Fed. 214, 103 C. C. A. 32, the circuit court of appeals, fifth circuit, in a suit involving a contract between the holder of the legal and equitable title, under a patent issued by the state of Texas, thus stated the rule:

“In deciding this case, so far as it involves the construction of statutes of the state of Texas, we are controlled by the decisions of the court of last resort in that state; and we, of course, look to the law of the state in which the land is situated for the rules which govern its transfer and alienation, and the effect to be given decrees and judgments affecting titles. *Simpson County v. Wisner-Cox Lumber & Mnfg. Co.*, 170 Fed. 52, 95 C. C. A. 227.”

179 Fed. 218.

This court, in Western Pacific Ry. Co. v. Southern Pacific Co., 151 Fed. 376, 80 C. C. A. 606, speaking of the effect of a legislative grant of lands to the town of Oakland, said:

“Both the limits of the town and the limits of the grant have been determined by the supreme court of California in a case in which it became necessary to construe the grant and the boundaries of both the town and the grant. City of Oakland v. Oakland Water Front Co., 118 Cal. 160, 50 Pac. 277. The construction placed by that court upon the language of the act of May 4, 1852, and its determination of the questions of local law involved in that suit, must, of course, be adopted by a federal court in dealing with questions arising under them. This rule is so well established that the citation of authority is unnecessary.”

151 Fed. 382.

Again, in Berry v. Northwestern & P. H. Bank, 93 Fed. 44, 35 C. C. A. 185, this court held the decision of the highest court of the state of Idaho construing a statute and declaring that an acknowledgment by a married woman, precisely similar in form as the one before the court except as to names and dates, was binding on a federal court sitting in that state, declaring:

“That the construction of the statute of Idaho by the highest court of that state in respect to a question of this sort is binding upon the federal courts is thoroughly well settled. Therefore, without expressing or intimating any views of our own in respect to the con-

formation of the certificate of acknowledgment of the mortgage in suit to the statute of Idaho, the judgment of the court below is affirmed."

93 Fed. 46.

The question involved in this case was in principle directly decided by the United States circuit court of appeals for the sixth circuit in Lockard v. Asher Lumber Co., 131 Fed. 689, 65 C. C. A. 517. That was a suit in equity in the circuit court to quiet the title of complainant to certain land in Harlan county, Kentucky. Complainant claimed under a patent issued by the state. The question presented for decision was whether the patent was void. After quoting the provisions of the Kentucky statute the court said:

"The construction of this statute—the ascertainment whether it does or does not prohibit the issue of a patent for more than 200 acres—is obviously a Kentucky question. The federal courts follow the rule laid down by Chief Justice Marshall in Polk's Lessee v. Wendal, 9 Cranch. 87, 97, 3 L. Ed. 665:

"'In the cases depending on the statutes of a state, and more especially in those respecting titles to land, this court adopts the construction of the states, where that construction is settled and can be ascertained.'"

131 Fed. 690.

And, in concluding its opinion, the court used this language:

"Whatever view we might be disposed to take of the proper interpretation of this act, with respect to the matter involved in this case, if it were before us

as an original question, our examination of the foregoing cases decided by the court of appeals of Kentucky constrains us to the conclusion that that court, in the exercise of its rightful authority, has settled its construction, and settled it in favor of the validity of the patent before us."

131 Fed. 695-696.

The circuit court of appeals for the fifth circuit, in Simpson County v. Wisner-Cox Lumber & Mfg. Co., 170 Fed. 52, 95 C. C. A. 227, in holding that whether leases of school lands in Mississippi for 99 years created a leasehold estate or a determinable fee, or some estate greater than a leasehold, was to be determined by the law of Mississippi as enunciated by her highest judicial tribunal, pertinently observed:

"It is a principle firmly established that the federal courts will follow the construction given to the statutes of a state by the highest judicial tribunal of such state (Leffingwell v. Warren, 2 Black 599, 603, 17 L. Ed. 261; Joseph Dixon Crucible Company v. Paul [C. C. A.], 167 Fed. 784, 788); and it is equally well settled that to the law of the state in which the land is situated we must look for the rules which govern its descent, alienation, and transfer, and for the effect and construction of wills and other conveyances (Clarke v. Clarke, 178 U. S. 186, 191, 20 Sup. Ct. 873, 44 L. Ed. 1028). The mere statement of the case shows that it must be governed by the laws of Mississippi. *It would be intolerable to have one rule prevailing in the state courts and another in the federal courts as to the construction of state statutes and leases of real estate*

*situated in the state.* It is fundamental that the construction placed on a state statute by the state's highest court is looked on by a federal court as a part of the statute itself, and that the laws of the state, as expounded by its court of last resort, constitute the law of the land as to the conveyance, lease, and titles of real estate situated within the state. We have, therefore, only to look to the laws of Mississippi to see if the two questions involved in this case have been settled by them."

170 Fed. 54-55.

See, as further illustrating and applying this rule:

Bardon v. Land & River Imp. Co., 157 U. S. 327, 331;

Olcott v. Bynum, 17 Wall. 44, 57;

Slaughter v. Glenn, 98 U. S. 242, 244;

Emigrant Co. v. County of Adams, 100 U. S. 61, 70.

The same principle applies where the question in issue is a question of practice. Thus, in Thompson v. Thompson, 226 U. S. 551, the supreme court held that it was bound to follow the ruling of the state court that an affidavit made on information and belief was sufficient to justify the issuance of an order for the service of summons by publication. The court said:

"The material fact upon which, according to the laws of that state, the jurisdiction of the Virginia court depended, was the non-residence of the defendant. The code required (section 3230) that this fact should appear by affidavit. The affidavit in question set forth

the fact; the circumstance that it was averred on information and belief affected merely the degree of proof. In the absence of any local law excluding the use of such an affidavit, the decision of the state court accepting it as legal evidence must be deemed sufficient on collateral attack to confer jurisdiction on that court over the subject-matter in accordance with local laws."

226 U. S. 566.

So, in *Audas v. Highland Land & Bldg. Co.*, 205 Fed. 862 (C. C. A. 6th cir.), it was held that the decision of the highest court of a state that a foreclosure proceeding was not invalidated by certain alleged defects in the procedure, in so far as it establishes or accords with the settled construction of the statutes of the state, is binding on a federal court.

The holding of the California supreme court in *People v. Davis*, 143 Cal. 673, that such a judgment roll as was there and is here before the court conclusively establishes that jurisdiction of the person of the defendant was acquired and that the judgment rendered was not void is sustained by an unbroken line of decisions, among which may be cited:

*People v. Temple*, 103 Cal. 453;

*People v. Norris*, 144 Cal. 422;

*Sharpe v. Salisbury*, 144 Cal. 721;

*People v. Mason*, 144 Cal. 770;

*Cargile v. Silsbee*, 148 Cal. 259;

*Brown v. Jorres*, 148 Cal. 269;

*Shephard v. Mace*, 148 Cal. 270;

*Emery v. Kipp*, 154 Cal. 83;

*Roberts v. Jacob*, 154 Cal. 307, affirmed *Jacob v. Roberts*, 223 U. S. 261.

People v. Temple, *supra*, was decided July 27, 1894, by department one of the supreme court of California, and a hearing in bank denied, and was based on prior decisions of the court. It therefore appears not only that the supreme court of the state has pronounced the very judgment in question here valid, but that by an unbroken line of decisions has held judgments based upon service by publication, where the record was precisely the same as the one under consideration, valid, binding and effectual to determine and forfeit the rights of the holder of a certificate of purchase. These decisions have established a rule of property which has since been repeatedly recognized and followed not only by the courts but by the state land department and which the federal courts are bound to recognize and apply whenever similar questions are presented for their determination.

The repose of titles, and every consideration of public policy, fair dealing, and justice demands that a purchaser, where a judgment forms a link in the chain of title to real property acquired by him without notice of any infirmity, under judicial proceedings regular on their face, should be protected as against mere errors of the court and against secret vices in the proceedings, which can only be made to appear by proof of facts *dehors* the judgment roll; for, if the rule were otherwise, as observed by Mr. Justice Crockett:

“No prudent person would purchase at a judicial sale, if he incurred the hazard of losing his money, in case it afterwards should be made to appear that the judgment was obtained by perjury or other fraudulent

practices, or that the record on which he relied, as proving a service on the defendant, was in fact false."

Reeve v. Kennedy, 43 Cal. 651.

**The Bill is Without Equity, Makes a Collateral Attack on the Judgment in People v. Davis, Contains No Showing of a Meritorious Defense, and Utterly Fails to State Any Grounds Entitling Appellant to Equitable Relief.**

The facts alleged for the purpose of showing the invalidity of the judgment of foreclosure are all matters *dehors* the record and pertain to the insufficiency of the affidavit (which constituted no part of the judgment-roll when the judgment was rendered; People v. Temple, 103 Cal. 447; People v. Davis, 143 Cal. 673) to authorize the court to make the order directing the service of the summons by publication; or to state the proposition in another way, complaint is made only of irregularity in the steps taken to obtain jurisdiction; and every argument made by appellant ignores the distinction between the entire want of jurisdiction and an irregularity in some of the steps taken to obtain jurisdiction. This misconception of the case by appellant results, apparently, from a misuse by him of the word "void," as used in the law relating to judgments. A void judgment is a judgment which, upon its face, appears to be a mere nullity; a judgment which requires extrinsic evidence to exhibit its infirmity, is voidable only and not void. As is said by Freeman in his work on Judgments, Vol. 1, Sec. 116:

"\* \* \* the word 'void' can with no propriety be applied to a thing which appears to be sound, and

which, while in existence, can command and enforce respect, and whose infirmity cannot be made manifest. If a judgment rendered, without in fact bringing the defendants into court, cannot be attacked collaterally on this ground, unless the want of authority over them appears in the record, it is no more void than if it were founded upon a mere misconception of some matter of law or of fact occurring in the exercise of an unquestionable jurisdiction. In either case, the judgment can be avoided and made *functus officio* by some appropriate proceeding instituted for that purpose; but if not so avoided, must be respected and enforced."

A clear statement of the exact meaning of the words "void" and "voidable," as used in reference to judgments, is found in *Kavanagh v. Hamilton*, 53 Colo. 157, 125 Pac. 512, where the court said:

"The words 'void' and 'voidable' do not denote different degrees of faultiness in judgments, but are a classification based on the evidence. If an inspection of the record proper furnishes the facts showing that the court acted without jurisdiction, the judgment is void, and may be collaterally attacked. If, on the other hand, the record does not show this jurisdictional infirmity, or does not furnish the evidence of nullity, or if it shows or recites jurisdictional facts which are untrue, the judgment is voidable. The attack upon it, however, in such a case, must be direct, for the purpose of establishing by other evidence the untruthfulness of the record. When this is done, it is as void as any judgment which the record shows was rendered without jurisdiction. The classification generally de-

pends on the method of attack, which is determined by the source from which the evidence comes. If the judgment is void, the source of the evidence to prove it is the judgment roll, and the attack may be collateral; whereas, if it is voidable, the evidence to prove it void must come from some source other than the judgment roll, and the attack must be direct, and cannot be collateral. A void judgment must show from an inspection of its own record that it is void, while a voidable judgment shows from its record that it is good, and it will remain good until proven void, in a suit brought for that purpose."

125 Pac. 515.

The judgment in *People v. Davis* recites that the defendant has "been regularly served with process, as required by law." [Tr. p. 53.] Upon its face, therefore, it appears that the court had acquired jurisdiction of the person of the defendant, and that the judgment itself was valid. The supreme court of California has twice expressly held that the judgment was not void, and could not be subjected to collateral attack. (*People v. Davis*, 143 Cal. 673; *Lake v. Bonynge*, 161 Cal. 120.) It has also declared "that the sole remedy of the aggrieved party, who may not, in fact, have been served, is to be found in a new action on the equity side of the court." (143 Cal. 675.)

In *Stead v. Curtis*, 205 Fed. 439, this court recently had under consideration very similar questions. That was a suit in equity to vacate a decree of a probate court admitting a will to probate. The grounds of

attack were fraud and want of jurisdiction on the part of the probate court. In speaking of the nature of the proceedings and the limitations on the powers of the court, it was said in the opinion:

"Nor can we consider the averments of the bill, in so far as they contradict or add to the record in the probate proceeding. To escape the operation of the principles we have already discussed, and in order that the point may have any independent merit, it must affirmatively appear upon the face of the record itself that the judgment is void, and the challenge of the plaintiffs is upon this ground."

205 Fed. 448.

This judgment, then, is valid until reversed or set aside.

In Black on Judgments, vol. 1, sec. 252, a collateral attack is defined in the following language:

"We are next to inquire what constitutes a collateral attempt to impeach a judgment within the meaning of the rule prohibiting such endeavors. And here we shall find that the word 'collateral' is always used as the antithesis of 'direct,' and it is therefore wide enough to embrace any independent proceeding. To constitute a direct attack upon a judgment, it is said, it is necessary that a proceeding be instituted for that very purpose. If an appeal is taken from a judgment or a writ of error, or if a motion is made to vacate or set it aside on account of some alleged irregularity, the attack is obviously direct, the sole object of the proceeding being to deny and disprove the apparent validity of the judg-

ment. But if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral and falls within the rule."

In O'Neil v. Potvin, 13 Idaho 721, 93 Pac. 20, the court said:

"The first question presented is whether this is a collateral or direct attack on that judgment. This action was instituted to quiet the title to said land in the appellant. That was its ultimate object and purpose; and, in order to do that, said judgment in the Malanfant case must be held to be void. This action is clearly a collateral attack on that judgment. \* \* \* The appellant seeks in this action to obtain some other relief than that of setting aside said judgment. The main object is to quiet the title of said land in himself, and, although the overturning of that judgment is necessary to his success, it does not make this action any the less a collateral attack upon said judgment."

93 Pac. 21.

In Cully v. Shirk, 131 Ind. 76, 30 N. E. 882, 31 Am. St. Rep. 414, 416, an action was brought to set aside, vacate and declare null and void a judgment rendered in an action to foreclose a mortgage, upon the ground that the sheriff's return of service of process was false. The court said: "The general rule is laid down that any attack upon a judgment for want of

jurisdiction in the court to render it, predicated upon a matter *dehors* the record, is collateral."

It results from the application of the principles enunciated in the foregoing authorities that the attack here made is essentially collateral and not direct. This being so, it is, we submit, a conclusive answer to every contention of appellant, that inasmuch as the judgment is not void upon its face, it conclusively establishes the fact that appellant's predecessor had, and that appellant has, "no right whatever in regard to the land," and that Mary A. Bonynge was entitled to purchase the same. (*Cargile v. Silsbee*, 148 Cal. 259, 260.) Before complainant can be awarded any of the relief he has prayed for, namely, that a trust be fastened upon the title of appellees, and they be compelled to convey their title to appellant, the judgment of *People v. Davis* must be set aside in a suit brought for that purpose. The fact that this is an incident, or even a necessary concomitant to the relief sought does not, however, have the effect of changing an otherwise collateral attack upon the judgment into a direct attack.

*It is not charged or suggested that Davis or Gilman had any defense whatever to the cause of action set forth in the complaint in People v. Davis, which is indispensably necessary to warrant the setting aside of a judgment.*

Assuming now, for the sake of the argument only, that this is a suit to set aside the judgment of foreclosure against Davis, the bill is radically defective in failing to set forth any facts tending to show that Davis or Gilman had a meritorious, or any, defense

to the cause of action set forth in the complaint against Davis. On the contrary, the allegations of the bill show that in addition to the twenty per cent. of the purchase price, interest was paid only to January 1, 1900, and hence that when the action was instituted three years' interest was due and delinquent; and it is not alleged that any of the statements made in the complaint in the action against Davis were untrue.

While there are sporadic cases holding that where it is alleged that there was no service of process, it is not necessary to show that a meritorious defense existed, the overwhelming weight of authority requires such a showing in all suits to vacate judgments, on whatever ground the attack is made, and this is the rule in the federal and California courts and the one approved by the leading text writers. In other words, before a court of equity will interfere to set aside or vacate a judgment, two elements must be present: First, there must be a want of equity on the part of the person who obtained the judgment; and, second, and no less important, the party seeking to vacate the judgment must show equity upon his part; or, as the rule is usually phrased, must present a meritorious defense to the cause of action set forth in the original complaint. The rule is based upon the principle that equity relieves only those who present an equitable case; it does not follow because a judgment was rendered without a strictly legal service of summons, or, indeed, where there has been no service whatever, that the defendant against whom judgment is so rendered is entitled to a decree annulling it. The rule is a wholesome and

salutary one; the time and attention of the court ought not to be consumed in hearing a proceeding to set aside a former judgment unless such judgment has in reality prejudiced the rights of the party complaining. If it is not made to appear that any different result would have been reached had he been properly served, then he is not in a position to say that anything inequitable has been done him.

Let us apply these principles to the case made by the bill. It is not alleged that the judgment in People v. Davis was unjust, or, we reiterate, that Davis or Gilman had any defense to the cause of action set forth in the complaint on which that judgment is based. The title to the land described in the Davis certificate was never vested in him; the land was the property of the state and the title remained in the state until the issuance of its patent to Mary A. Bonynge. At the time the complaint against Davis was filed, three annual installments of interest were delinquent and unpaid. So, appellant is in the attitude of attacking the judgment foreclosing the Davis certificate without any pretense that either Davis or Gilman had any defense, meritorious or technical, to that action.

The authorities holding that a meritorious defense must be stated in an action to vacate a judgment are numerous, and only a few of the more important of these cases will be cited.

Massachusetts Benefit Life Assn. v. Lohmiller,  
74 Fed. 23, 20 C. C. A. 274;  
White v. Crow, 110 U. S. 183, 187;  
Pickford v. Talbott, 225 U. S. 651, 657;

Gregory v. Ford, 14 Cal. 138;  
Gibbons v. Scott, 15 Cal. 284;  
Parsons v. Weis, 144 Cal. 410;  
Burbridge v. Rauer, 146 Cal. 21;  
Boland v. All Persons Interested, 160 Cal. 486;  
Gray v. Lawlor, 151 Cal. 352, 356;  
1 Black on Judgments, sec. 376;  
6 Pom. Eq. Jur., sec. 667;  
2 Freeman on Judgments, sec. 498;  
Schilling v. Quinn (Ind.), 99 N. E. 740;  
Cadillac Automobile Co. v. Boynton, 240 Ill. 171,  
88 N. E. 564.

Massachusetts Benefit Life Assn. v. Lohmiller, *supra*, was a suit to enjoin the enforcement of a default judgment in which it was claimed that no jurisdiction had been obtained over the person of the defendant, a corporation, because service had been made upon an agent who was not authorized to receive it. The court held that there was some color of claim that due service was made, and that since there was no meritorious defense alleged, equity would not enjoin the enforcement of the judgment. In the opinion it is said:

“The bill is silent in another respect, of which these principles of equity generally require clear expression before relief can be extended. There is no impeachment of the cause of action upon which the judgment was rendered, nor suggestion of defense in whole or in part; and, for all that appears in the record, the policy of life insurance referred to in the bill, and set out in the answer, is an undisputed and matured obligation against the complainant, and justly enforceable as ad-

judged. If that is the true situation, interference would serve only 'the unworthy purpose of delaying, vexing, and harassing suitors at law in the prosecution of their just demands.' \* \* \* The rule is invariable that equity will not enjoin a judgment procured through fraud or artifice unless the complainant can 'aver and prove that it had a good defense upon the merits.' \* \* \* The authorities are not in unison in holding the same rule where the judgment was obtained without service of process, and where the defendant had no opportunity to be heard. \* \* \* The preponderance of authority in the state courts is, however, the other way, and upholds the rule 'that equity will not interfere until it appears that the result will be other or different from that already reached.' Freem. Judgm., sec. 498; Taggart v. Wood, 20 Iowa, 236; Gerrish v. Seaton, 73 Iowa, 15, 34 N. W. 485; Stokes v. Knarr, 11 Wis. 389; Harris v. Gwin, 10 Smedes & M., 563; Stewart v. Brooks, 62 Miss., 492; Secor v. Woodward, 8 Ala., 500; Dunklin v. Wilson, 64 Ala., 162; State v. Hill, 50 Ark., 458, 8 S. W. 401, disaffirming Ryan v. Boyd, 33 Ark., 778; Gifford v. Morrison, 37 Ohio St. 502; Wilson v. Hawthorne, 14 Colo. 530, 24 Pac. 548; Sharp v. Schmidt, 62 Tex. 263; Pilger v. Torrence, 42 Neb. 903, 61 N. W. 99; Colson v. Leitch, 110 Ill. 504. No such exception to the general rule appears to have found recognition in the practice of the federal courts, and its incorporation would not harmonize with the principle that equity will not enforce rights upon grounds which are wholly legal or technical, nor 'grant an injunction to stay proceedings at law merely on ac-

*count of any defect of jurisdiction of the court.*' 2 Story, Eq. Jur., sec. 898. For the purposes of the case at bar it is not necessary to determine whether a showing of meritorious defense may not, under some circumstances, be dispensed with where the judgment was obtained without service, notice, or color of right, as it would even then be discretionary with the court to require it before granting an injunction. But the exercise of sound judicial discretion would exact it here, for the reason that there was at least color of claim that due service had been made that the complainant had notice, and that the cause of action is founded on a liquidated and *prima facie* demand; \* \* \*."

In White v. Crow, *supra*, a judgment was attacked upon the ground of fraud. The supreme court held that, in the absence of a meritorious defense, equity would not afford relief.

In Gregory v. Ford, *supra*, a leading case, the supreme court of California said:

"The case then on the pleadings and proofs resolves itself into this proposition of law: Can a defendant having no defense to an action enjoin a judgment by default obtained on a return by the sheriff of service of process, upon the ground that the return is false; that in fact he had no notice of the proceeding? It is difficult to see upon what principle chancery would interfere in any such case in favor of such a defendant. In analogy to its usual course of procedure, it would seem that the plaintiff, having acquired without any fraud on his part, a legal advantage, would be per-

mitted to retain it as a means of securing a just debt; and that a court of equity would not take it away in favor of a party who comes into equity acknowledging that he owes the money, and claims only the barren right of being permitted to defend against a claim to which he had no defense."

14 Cal. 141.

The Davis certificate of purchase, as we have seen, represented and constituted only an *executory contract* upon the part of Davis to purchase certain land owned by the state, which agreed to sell him the land upon his compliance with the terms of the contract. *Gibbons v. Scott, supra*, is exactly analogous, and holds that in such a case a meritorious defense is a prerequisite to the maintenance of a suit in equity by the vendee to vacate judgment against him. The case there was as follows:

"This is a suit in equity, to set aside a judgment of the District Court of the Tenth Judicial District. The judgment was rendered in September, 1853, and the record shows that there was a personal service of the summons, and a copy of the complaint. The plaintiff alleges that no such service was in fact ever made, and that he had no notice of the proceedings until long after the rendition of the judgment. He further alleges that the officer who certified to the service, and the sureties upon his official bond, are insolvent. So far, the case falls exactly within the rule laid down in *Gregory v. Ford*, decided at the October term, 1859; but the plaintiff goes further, and alleges that he had a valid defense to the action, of which he claims that in equity

and justice he should still be permitted to avail himself. But the allegations in relation to this defense are insufficient. The defense is founded upon an executory agreement, by the terms of which certain things were to be done by the plaintiff, and in consideration thereof he was to be relieved from the debt for which the action was brought. It is not alleged that any of these things were performed by him, or that he ever offered, or was, or has been, at any time, ready or willing to perform the same."

15 Cal. 286.

To determine what would constitute a meritorious defense in any particular case, the allegations of the complaint in the action in which the judgment was rendered, and the issues which could be raised by an answer on the merits, must be considered. As has been shown, under the allegations of the complaint in People v. Davis, a meritorious defense would necessarily involve a denial of the alleged delinquency in interest payments. Complainant does not even claim that such payments were, in fact, made. Gilman knew that such payments would become due, and *when* they would be due. He knew that they *had become* due, and had not, in fact, been paid; he knew that thereby his rights were subject to forfeiture; that if the officers of the state did their duty his rights would be lost. The record conclusively shows that Davis and Gilman did have constructive notice of the forfeiture of his rights in the certificate. It therefore necessarily follows that there was no meritorious defense to the cause of action set forth in the complaint in People v. Davis; and that ap-

pellant, therefore, cannot maintain a suit to vacate the judgment there rendered.

Appellant claims, however, that the very statement of his claim of title constitutes a meritorious defense. The question here is not whether there is a meritorious defense to *this* action, but whether such a defense existed to the original action of People v. Davis, the judgment in which he is attacking. As we have said, the question of a meritorious defense to that suit turns on the question of payment or nonpayment of the delinquent interest installments. It is true that, as a *result* of the judgment in People v. Davis, the holder of the Davis certificate lost his contract rights to complete the purchase of the land. This, however, is the *effect* of the non-existence of a meritorious defense, *and does not of itself constitute such a defense*. It is the penalty imposed by law upon a would-be purchaser for his own delinquency. At most, such a person has no title to the land. He is merely the possessor of an executory contract to purchase the land; and his right to complete the purchase is contingent upon his own efforts and good faith, and compliance with the reasonable and liberal regulations of the land laws of the state.

Parsons v. Weis, 144 Cal. 410, is cited by appellant; but the most cursory examination of that case will show that it does not even tend to support his contention. After stating, and approving, the rule that a meritorious defense is required as a condition precedent to relief in equity; and after referring to Gregory v. Ford, 14 Cal. 138, the court examined the allegations of the complaint then before it, and held them sufficient.

These allegations were, in effect, that the plaintiff in the original suit falsely claimed to be the owner of the property, and knew that his claims were false and unfounded. The exact language of the court is:

"To meet this requirement the plaintiff has alleged that the averments of Weis in the former action were not only false, but that he knew that they were false, and the court has found that these charges were true. These allegations, taken in connection with her ignorance of the existence of his action against her, and the circumstances by reason of which she had failed to receive any notice thereof, were sufficient, if established by proof, to justify the court in setting aside the judgment upon the grounds that it had been fraudulently obtained."

144 Cal. 419-420.

It is also true that, if the judgment in *People v. Davis* stands, and by reason of his own laches, delay and failure to act within the period of time prescribed by statute, appellant cannot redeem from the foreclosure under that judgment. This, however, is not even an effect of the judgment, but is the result of his own default and that of his predecessor in interest. It is preposterous to claim that the right to redeem from the judgment constitutes a meritorious defense to that judgment. A right of redemption is an equitable, or, as here, a statutory right, incident to, though independent of, the judgment to which the right attaches. So far from being a meritorious defense to an action, it does not even arise until after judgment in the action is rendered, and the rights of parties thereto upon the merits

settled and determined. Moreover, it presupposes the existence of a valid, enforceable judgment. There can be no right of redemption from a void judgment. The two ideas are utterly inconsistent with each other. Complainant has taken the position throughout this case, both upon the argument of the demurrer and in his brief upon appeal, that the judgment in People v. Davis is utterly void. He cannot now, for the sole purpose of meeting this particular point, claim that the judgment was a valid judgment; but that, under the existing law, he had a specified time within which he could make a redemption from the foreclosure there decreed.

It appears, then, that complainant's bill is without equity, and shows no meritorious defense to the cause of action upon which judgment was rendered in People v. Davis, and this of itself requires an affirmance of the decree dismissing the bill.

**The Appellant is Barred From Maintaining this Suit by  
the Laches of his Predecessor in Interest and the  
Statutes of Limitation of California.**

It is axiomatic that, independently of any statute of limitations, courts of equity uniformly decline to assist a person who has slept upon his rights and shows no excuse for his laches in asserting them, and always refuse their aid to the enforcement of stale demands; that nothing can call a court of equity into activity but conscience, good faith, and reasonable diligence; that where these are wanting the court is passive, and does nothing; that laches and neglect are always discountenanced, and that from the beginning there has always

been a limitation as to the time within which suits in equity may be brought.

Speidel v. Henrici, 120 U. S. 377, 387;  
McNeil v. McNeil, 170 Fed. 289.

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*It affirmatively appears from the allegations of the bill that the judgment foreclosing the Davis certificate of purchase was rendered nineteen years before the filing of the bill; that Gilman, appellant's predecessor in interest, acquired actual knowledge of its rendition and of the defects in the proceedings for publication of summons more than eleven years prior to the institution of this suit, and Gilman and appellant at all times, and for nineteen years, have had constructive notice from public records of the same facts, and knowledge of circumstances more than sufficient to put a reasonable person upon inquiry as to the existence of the irregularities appellant now claims to exist.*

The judgment in People v. Davis was entered December 27, 1892, and a certified copy filed in the office of the Register of the State Land Office January 4, 1893, and in the office of the county recorder January 16, 1893. Mary A. Bonynge applied to purchase the land July 22, 1899, her application was approved January 23, 1900, and a certificate of purchase issued to her January 23, 1900. The present bill was filed December 30, 1911, nearly twelve years after the issuance of the certificate to Mrs. Bonynge, and nineteen years after the entry of the judgment foreclosing the Davis certificate. Lake, who had no interest in the Davis

certificate, is the person who claims, and who is entitled to, any credit there may be for making the "discovery" that Davis had been wronged in the course of the proceedings in People v. Davis. In his affidavit of December 13, 1900, used on the motion to vacate the judgment in People v. Davis, Lake swears that "the first information relating to said delinquency, or to this action, or to the default or pretended judgment therein, was communicated to them [Davis and Gilman] by *this affiant*, after he had, *by mere accident*, and within six months last past, for the first time discovered that said suit had been instituted and said pretended judgment entered." [Tr. p. 58.] It will be noticed, too, that December 7, 1900, Gilman, in consequence of the information which Lake possessed, had transferred to him a one-half interest in the Davis certificate of purchase. It is also to be borne in mind that Lake does not state *how* he happened to make the "discovery," except that it was "by mere accident." Gilman, in his affidavit, filed and used at the same time, concedes "that the first information relating to said delinquency \* \* \* was communicated to this affiant \* \* \* by one Fred W. Lake." [Tr. p. 61.] Davis, also, in the language of the same draftsman, declared "that the first information relating to said delinquency \* \* \* was communicated to this affiant \* \* \* through one Fred W. Lake." [Tr. p. 63.] Now, Davis knew that he had not paid the full purchase price of this land. He knew that there was an unpaid balance upon which he was required to pay interest annually, and it is nowhere stated that any installment of interest accruing after the issuance of the

certificate was ever paid. Gilman succeeded, by assignment, to Davis' interest in the certificate, and he, of course, knew that Davis had no patent—that a part of the purchase price remained unpaid—and, knowing the law, as he is presumed to have done, he likewise knew that failure to make payments of interest on the purchase price when due would subject his rights to proceedings for a forfeiture. In *Burgess v. Hixon*, 75 Kan. 201, 88 Pac. 1076, this principle is recognized and stated in the following apt language:

"Of course, Walton knew from the instant of his first default that his rights were subject to forfeiture. He knew that, upon his failure to pay, it was the imperative duty of the county clerk to put into operation, and of the sheriff to carry out, forfeiture proceedings. He was bound to anticipate and to expect that the law would be followed, and the record which was in fact made was ample to give him information that the state had undertaken to terminate his rights, and that the officials having authority in the matter construed what was done to amount to a restoration of the land to the public domain."

88 Pac. 1076-77.

This language was approved and applied by the circuit court of appeals for the eighth circuit in *Burgess v. Hillman*, 200 Fed. 925, 931.

Gilman also knew whether or not he had paid the interest, and when he stated in his affidavit that he did not know that there was any delinquency until 1900, when he was so informed by Lake, he was, in effect,

swearing that he did not know that he had not done an act which the law required him to perform annually on or before a certain specified date. His lack of knowledge of proceedings which were a matter of record, and which he knew would be taken in case of his delinquency and failure to perform an act which he also knew he had not performed, is the only excuse submitted for failure to act for nine years,—from December 27, 1892, to December 14, 1900, the date of the Lake motion to vacate the judgment in People v. Davis. Not only was the judgment spread at large on the records of the court, but certified copies were filed in the recorder's office and in the office of the register of the state land office, as required by law. In flagrant disregard of their obligations, Davis and Gilman made no payments and did not in any manner concern themselves as to their rights in the premises. They supinely slept upon their rights until Lake, a volunteer, who then had no interest in the certificate, "by mere accident" "discovered" that "said suit had been instituted and said pretended judgment entered; and that no summons or complaint in said action was ever or at all served upon said defendant in said action." The "discovery" of Lake was not that the summons had not been published, or that the judgment was not a valid judgment on its face, but that, as claimed by him and the other persons then interested in the certificate, the affidavit on which the order for publication of summons was made was defective and the complaint was unverified. The subject-matter of this "discovery" was then, as it always had been and ever will remain, a part

of the files in the case of People v. Davis, and a public record. The possession of the means of knowledge, it is universally held, is the equivalent of knowledge itself, and when the fundamental facts upon which the invalidity of any proceeding rests are matters of public record, open to the inspection of the parties, ignorance of the existence of such facts as the record discloses will not excuse laches or stay the running of the statute of limitations.

Hardt v. Heidweyer, 152 U. S. 547, 560;

Reed v. Munn, 148 Fed. 737, 761, 80 C. C. A. 215;

Hecht v. Slaney, 72 Cal. 363, 367;

Lady Washington Cons. Co. v. Wood, 113 Cal. 482.

Prior to December, 1900, as has been shown, Lake had informed Davis and Gilman of the existence of the proceedings to foreclose, and of the decree foreclosing, the Davis certificate. December 31, 1900, Gilman, Lake and Snow, by permission of the court, filed their complaint in intervention in the action in which Moran was plaintiff and appellee Mary A. Bonyngé was defendant, and in which a contest as to the right to purchase this land was being waged. In their complaint in intervention, after setting up their supposed rights under the Davis certificate, Gilman, Lake and Snow alleged that the certificate of purchase "had not and has not been cancelled by any *valid* judgment, and the interest and estate thereunder of these intervenors and each of them in and to said lands and premises had not and has not been foreclosed and destroyed" [Tr. p. 80]; they fur-

ther charged "that the defendant, Mary A. Bonynge, above named, *claims to own the said land under and by virtue of a certain certificate of purchase of date January 23, 1900*, and numbered 13734, issued to her pursuant to her application to purchase the said land, dated July 22, 1899, and numbered 6749; but these interveners say that said certificate of purchase was unlawfully and improvidently issued to said defendant, and constitutes a cloud upon the title of these interveners and each of them, in and to the said lands and premises." [Tr. p. 79.] So that it appears from this complaint in intervention that not only did Gilman, plaintiff's predecessor in interest, have actual notice in December, 1900, that a judgment foreclosing the Davis certificate had been entered December 27, 1892, but that he knew December 31, 1900, eleven years before the bill in this suit was filed, that Mary A. Bonynge had, July 22, 1899, applied to the state to purchase the land, and that January 23, 1900, the state had issued to her its certificate of purchase. It is further alleged in the complaint in intervention that Moran, the plaintiff in the action in which the intervention was filed, claims the right to purchase the south half of said section 36 by virtue of an application made by him to the surveyor-general March 24, 1900; also that at the time of the issuance of the certificate of purchase to Mary A. Bonynge, and at all times since, including the time of the application to purchase the south half, made by Moran, the Davis certificate of purchase had not been cancelled by any *valid* judgment; and that the interest and estate thereunder of the interveners in and to said land had not been foreclosed. So that ever since the

year 1900 Gilman, Lake and Snow have actually known not only that a decree had been entered foreclosing the Davis certificate, but that, in the year 1899, the surveyor-general, *treating the judgment of foreclosure as valid*, had received the Bonynge application to purchase, and in January, 1900, approved it and issued a certificate of purchase. The right of Gilman to attack the decree of foreclosure, or to question its validity, taking the view most favorable to appellant, accrued certainly not later than the date of the actual discovery of the existence of the judgment and the fact that the state had issued a certificate of purchase to Mary A. Bonynge. The failure on his part to avail himself of the legal remedies then open to him would preclude him, and does preclude appellant, from maintaining this suit.

Furthermore, it is alleged in the bill that actual knowledge was acquired by all parties October 1, 1900. [Tr. p. 25.] Prior to that date not only were the records constructive notice of the existing facts, but, having knowledge of his own delinquency and the duty of the officers of the state to take proceedings to foreclose the certificate, Gilman must be taken to have been put upon inquiry as to whatever action had been taken. The language used in *Foster v. Mansfield, Coldwater & Lake Michigan R. R. Co.*, 146 U. S. 88, is directly applicable to the facts disclosed here. The supreme court there said:

“The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence the tendency of courts in recent years has been to hold

the plaintiff to a rigid compliance with the law, which demands not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of all the facts."

146 U. S. 99.

The same principle was applied in McCuddy v. Ware, 20 Wall. 14, 19.

Burgess v. Hillman, 200 Fed. 929, to which reference has been made, is a case in many respects similar to the present one, except that the delay there was much shorter than here and the case presented was vastly stronger for the complainant than the one made in the case at bar. The suit was brought for the purpose of avoiding a statutory (not judicial) forfeiture of the rights of a purchaser of school lands belonging to the state of Kansas, and to obtain a decree declaring that the defendant held the title to the land in trust for complainant. It appeared that the holder of the certificate failed to pay an installment of the purchase price due March 9, 1900, and August 18, 1900, his rights were forfeited to the state pursuant to proceedings under the statutes of Kansas. The land was again advertised for sale at public auction and was purchased by one Phres, July 9, 1901. It was alleged in the bill that complainant did not learn of the forfeiture until October 1, 1903; that January 20, 1905, he commenced an action in a state court for the purpose of avoiding the forfeiture and for relief similar to that sought in the action later filed in the federal court, but that May 20, 1907, he dismissed the action without prejudice and

commenced the suit in the federal court July 23, 1907, which was less than seven years after the forfeiture occurred and less than four years after complainant had learned of the forfeiture. The circuit court dismissed the bill on demurrer for want of equity and its action was sustained by the circuit court of appeals. In its opinion the court stated that it found it unnecessary to discuss in detail the question of the validity of the proceedings which resulted in the forfeiture of the lands, as the court was of the opinion, conceding the forfeiture to have been voidable at the suit of appellant, *had he been diligent in the assertion of his rights*, a court of equity would not, upon the facts alleged in the bill, permit him to attack it. After observing that the state of Kansas had passed a statute of limitations in relation to actions like the one at bar, which became effective January 25, 1907, the court declared:

“It will thus be seen that this action was commenced only a day or two before the statute of limitations had run. Nearly five years elapsed after the forfeiture of the land before the suit was commenced in the state court, and, as appellant voluntarily dismissed that suit after it had been pending for two years without trial, it is of very little value as evidence upon the question of diligence, and it was nearly seven years after the land was forfeited that the present suit was commenced. The bill admits that appellant had actual notice of the forfeiture October 1, 1903, and still he waited until January 20, 1905, before he commenced the action in the state court. The proceedings which resulted in the forfeiture of the lands were matters of public record,

and any one sufficiently interested in the lands could have obtained notice of the state of the title at any time. \* \* \* It is true that Burgess was a non-resident of the state, but according to the bill he had an agent in charge of the collection of rents from the lands who did live in Kansas. \* \* \* The statute of limitations above quoted shows very emphatically that it is the public policy of the state of Kansas that actions like the one at bar shall be commenced promptly. If the same statute had been in force when the forfeiture of the lands occurred, it would have run many times before the date of the commencement of the present action. In line with this statute, we hold that this is one of the cases where a court of equity ought to declare appellant guilty of laches, although the suit was commenced within the statute of limitations.

\* \* \* \* \*

"It sufficiently appears from the record that the lands in question were of a speculative value, and appellant does not seem to have had sufficient interest in the same for three years to pay any of the installments of interest, or to ascertain from the many sources of information open to him the condition of the title. After having had actual notice of the forfeiture, he delayed more than a year before commencing his action in the state court, and then, after that action had been pending for two years, he dismissed it and commenced the present action. In the meantime appellees had gone into possession of the land and made lasting and valuable improvements. It is true appellant in his bill offers to allow appellees to receive credit by deducting the

value of the improvements from the rents and profits claimed by appellant, but we do not think appellees in equity owe appellant any rents and profits."

200 Fed. 930, 932.

In Wetzel v. Minnesota Ry. Co., 169 U. S. 237, it appeared that a land warrant had been transferred by certain of the complainants. A defect existed in the transfer, by reason of the fact that the consent of the orphans' court had not been obtained to the sale, and that such consent was necessary because certain of the parties interested were minors and under guardianship. The land at the time of the transfer was vacant land. In the course of time it became extremely valuable as city lots. There, as here, a volunteer and a stranger to the transaction became cognizant of the defect in the transfer and informed the complainant of it, and thereupon the suit was instituted. The court held that it was barred by laches, saying:

*"Knowledge of the transfer seems to have finally come to them, not through any exertion of their own to inform themselves of the facts, but by an accidental meeting with a lawyer from Minnesota, who had in some way, probably by an examination of the title, become cognizant of the defect in the transfer. It was a mere matter of chance when they would be informed of the defect in the defendants' title, or whether it would ever come to their knowledge at all. To permit them now, after a lapse of forty-four years from the time the warrant was issued, and of thirty years from the time the youngest child became of age, to impeach the transaction, would be an act of the most flagrant injustice."*

to the present holders of the property. This property, which was probably not worth more than one or two hundred dollars at the time of the location of the land warrant, is now estimated to be worth at least a million, and is covered, or partly covered, by houses and business blocks. \* \* \* The interests of public order and tranquility demand that parties shall acquaint themselves with their rights within a reasonable time, and although this time may be extended by their actual ignorance, or want of means, it is by no means illimitable."

169 U. S. 241.

Twin Lick Oil Co. v. Marbury, 91 U. S. 592, is a leading case, which applies the principle we are discussing to property which has greatly increased in, or is of a, fluctuating value. That case, too, dealt with oil-producing land.

In Johnston v. Standard Min. Co., 148 U. S. 360, where the land involved was mining property, and had been developed at great expense upon the part of the defendants, the court said:

"\* \* \* where property has been developed by the courage and energy and at the expense of the defendants, courts will look with disfavor upon the claims of those who have lain idle while awaiting the results of this development, and will require not only clear proof of fraud, but prompt assertion of plaintiff's rights."

148 U. S. 371.

Equally in point and persuasive are:

Patterson v. Hewitt, 195 U. S. 309;  
Galliher v. Cadwell, 145 U. S. 368.

*The facts that the rights of third parties have intervened; that oil has been discovered and developed; that the land has greatly increased in value; that the appellant and his predecessor in interest stood by and speculated upon such increase;—all combine to make it plain that the bill is without equity, and that the laches of appellant and his predecessor in interest has prejudiced appellees.*

As a result of the many years' delay, the situation of the parties has entirely changed. Davis is no longer interested in the land; Gilman has died, and complainant claims only as his remote speculative grantee; Mary A. Bonynge made application to purchase the land, paid part of the purchase price, and acquired her certificate of purchase more than eight years after the foreclosure of the Davis certificate, and in reliance upon the validity of the judgment of foreclosure; and she has since received her patent and at various times the other appellees have acquired interests in the property. The land was entered by Davis as land unfit for cultivation. It was regarded by Gilman, who succeeded to Davis' right by assignment in 1890, as of such little value that he paid no further attention to it,—not even concerning himself until October, 1900, about the payment of interest or whether the certificate had been foreclosed, which was ten years after the assignment by Davis to him. In the meantime the state, assuming that the judgment of foreclosure was valid, sold the land to

Mary A. Bonynge and issued its certificate of purchase to her. The land had become valuable, we may assume, as a result of the discoveries of petroleum in Kern county, and had been prospected and oil discovered and developed upon it; for it is alleged in the complaint that "defendants are, and for a long time past have been, extracting and taking from said land petroleum oil," and, in consequence, a one-sixth interest had, it is alleged in the bill, attained the value of one million dollars. [Tr. pp. 34, 35.] This court will, we submit, take judicial notice of the fact that the discovery and development of petroleum can only be accomplished by the expenditure of large sums of money. It therefore appears that the property in question is mineral land, that it has been developed by the defendants at great cost to them; and that its value has increased enormously. In such cases it is settled that courts of equity will presume that the delay has been injurious, and, on the ground of laches alone, deny relief, even though the period of limitation prescribed by statute has not run.

Reed v. Munn, 148 Fed. 737, 760, 761, 80 C. C. A. 215;

Wetzel v. Minnesota Ry. Co., 169 U. S. 237;

Twin Lick Oil Co. v. Marbury, 91 U. S. 587;

Johnston v. Standard Mining Co., 148 U. S. 360;

Patterson v. Hewitt, 195 U. S. 309;

Galliher v. Cadwell, 145 U. S. 368;

Jackson v. Jackson, 175 Fed. 710 (C. C. A. 4th Cir.);

Burgess v. Hillman, 200 Fed. 929.

In affirming a decree dismissing for laches a bill filed to vacate a decree of divorce eighteen months after its entry, this court said in *McNeil v. McNeil*, 170 Fed. 289:

"It is contended by appellant that no delay short of the period fixed by the analogous statute of limitations can constitute laches, unless it affirmatively appears that the delay has prejudiced the defendant. We do not so understand the law. It is true that it is only prejudicial delay which constitutes laches; but it does not follow that such prejudice must always be affirmatively shown. At least in some cases any unnecessary delay is presumed to have caused injury; and it is incumbent upon the complainant to make a satisfactory showing or excuse for the delay. Such, for example, is the rule where the interests of innocent third persons might be affected by the delay."

170 Fed. 291-2.

It will be noted: First, that the time prescribed by the analogous statute of limitations had not run; second, that unnecessary delay in some cases is *presumed* to have caused injury; third, that the rule is peculiarly applicable where, as here, the interests of innocent third persons *might* be affected by the delay.

Not only has appellant failed to state circumstances which in any wise excuse the gross laches of Gilman, but it appears from the allegations of the bill that the rights of innocent third persons not only might but would be affected if the relief prayed for were granted.

*Unavailing efforts to obtain relief by a resort to improper remedies constitute no ground of excuse for appellant's laches.*

Appellant contends that, since Gilman, Lake and Snow prosecuted unavailing legal remedies, therefore appellant cannot be said to be guilty of laches. It is well settled, however, that the unsuccessful pursuit of improper remedies is no excuse for the laches of a complainant in instituting the proper suit. Judge Van Fleet, in passing on the demurrer, stated this principle as follows:

“Upon the question of laches I am clearly of opinion that upon the facts appearing in the bill the attempt to assert complainant's supposed equities here at this date after the intervention of the rights of third parties, upon well-established principles, comes too late. The fact that during the long interval permitted to elapse between the rendition of the final judgment in People v. Davis and the filing of this bill, the efforts and activities of complainant's predecessors in interest were expended in the unavailing pursuit of improper remedies, does not avoid the bar of laches as against too late an assertion of a proper one. Frank v. Butler County, 139 Fed. 119; Boston v. Haynes, 33 Cal. 31; Varick v. Edwards, Hoffman's Chan. 382; Cockrill v. Hutchinson, 135 Mo. 67; Gray's Admr. v. Berryman, 4 Munf. (Va.) 181.” [Tr. pp. 146-147.]

The following cases also support and apply this general principle:

Blythe Co. v. Hinckley, 111 Fed. 827;  
Willard v. Wood, 164 U. S. 502;  
Curtner v. United States, 149 U. S. 662;

- Boston v. Haynes, 33 Cal. 31;  
Segers v. Ayers, 95 Ark. 178, 128 S. W. 1045,  
1046;  
Bunch v. Pierce County, 53 Wash. 298, 101 Pac.  
874;  
Ratliff v. Stretch, 130 Ind. 282, 30 N. E. 30, 31.

In *Blythe Co. v. Hinckley*, *supra*, this court held that, under the general rule of courts of equity, a bill of review must be filed within the time allowed by statute for an appeal; and that where an attempted appeal was taken in a case in which no appeal properly lay, the time for filing a bill of review was not extended by the fruitless attempt to appeal.

In *Curtner v. United States*, *supra*, it appeared that the complainant had a remedy open to him by instituting legal proceedings. Instead of doing so, he made ineffectual efforts to obtain relief by formal application to the land department. The court held that "the ineffectual pressure of the company on the land department furnished no excuse as between the real parties to this litigation," for the delay and laches in finally instituting the legal proceedings.

All that has been said applies equally to actions which have become barred by the statute of limitations. The rule here, as in the case of laches, is that the unavailing pursuit of improper remedies does not interrupt the running of the statute. In *Willard v. Wood*, *supra*, the court, through Chief Justice Fuller, said:

"The general rule in respect of limitations must also be borne in mind, that if a plaintiff mistakes his rem-

edy, in the absence of any statutory provision saving his rights, or where from any cause a plaintiff becomes nonsuit or the action abates or is dismissed, and, during the pendency of the action, the limitation runs, the remedy is barred. Alexander v. Pendleton, 8 Cranch, 462, 470; Young v. Mackall, 4 Maryland, 367; Wood on Limitations, sec. 293, and cases cited."

164 U. S. 523.

It is likewise settled that the mere assertion of a claim and fruitless endeavors to obtain its recognition constitute no excuse for delay in prosecuting the proper legal remedies.

Mackall v. Casilear, 137 U. S. 556, 567;

Clegg v. Edmondson, 8 DeG. M. & G. 787, 44 Eng. Rep. 593;

Lehmann v. McArthur, 3 L. R. 867, Ch. App. Cas. 493;

Kerfoot v. Billings, 160 Ill. 563, 43 N. E. 804, 808.

In Mackall v. Casilear, *supra*, the court said:

"The excuse for the delay is that complainant protested against Casilear's claim and notified him that he would not submit to the sale; but the mere assertion of a claim, unaccompanied by any act to give effect to it, cannot avail to keep alive a right which would otherwise be precluded. It is said, however, that complainant had been engaged in negotiations from time to time with Casilear, orally and by mutual correspondence in writing, which complainant hoped would result in a settlement and adjustment of their differences in regard

to the property held by him; but the bill does not state that Casilear gave any encouragement to such hopes, or ever promised any settlement or adjustment, or ever conceded that his purchase was in any respect doubtful, or ever in any way recognized the claims of the complainant."

137 U. S. 567.

These cases all support the appellees' position that appellant and his predecessors in interest could not invoke obviously inadequate remedies and then rely on the fruitless pursuit of such improper remedies as an excuse for their gross laches.

*Furthermore, appellant cannot consistently urge the proceedings taken by Lake in *People v. Davis* and by Lake and Snow in *Lake v. Bonynge*, as an excuse for Gilman's laches, and, at the same time, maintain that the questions decided in those cases are not res adjudicata as to appellant.*

Appellant asserts that he was not a party to, nor in privity with, any party to the motion of Lake to vacate the judgment in *People v. Davis*. If this be correct, then appellant is precluded from claiming any benefit from those proceedings as excusing the laches of Gilman. Appellant will not be permitted to say, for the purpose of claiming that he is not bound by the order of December 11, 1901, vacating the order of December 31, 1900, that he was not a party to the motion or bound by those proceedings, and then to maintain, when driven by the exigencies of his argument and to avoid

the application of the doctrine of laches, that he is entitled to the benefit of the proceedings taken by Lake as an excuse for Gilman's laches.

Appellant contends that since the alleged "discovery" of the delinquency and the existence of the judgment against Davis, in season and out of season, the claimants under the Davis certificate have been clamoring for relief. If he was privy to the litigation in People v. Davis (143 Cal. 673)—as we claim he was—he is necessarily bound by the judgment there rendered. If he was privy to Lake v. Bonynge—and we again say he was—then he is bound by the judgment in that case. But if Gilman was not a party or privy to these actions, then appellant is in no better situation, for in that event he stands convicted of taking no steps to have this judgment set aside, until the filing of this suit, December 30, 1911, eleven years after he confesses to have had actual notice of its alleged irregularity, and nineteen years after he has had constructive notice of the same facts. He cannot thus "blow hot and cold" and "mend his hold" whenever it suits his convenience. Consistency in argument is prized as highly, and is as bright a jewel, in law as in the other affairs of life.

*The failure of claimants under the Davis certificate to prosecute available legal and equitable remedies constitute such laches as precludes the appellant from maintaining this suit.*

At all times after the entry of the judgment in People v. Davis, December 27, 1892, adequate remedies by a resort to which all questions as to the validity of the judgment foreclosing the Davis certificate could have

been presented for adjudication were available to the claimants under that certificate, and their failure to prosecute them constitutes such laches as precludes appellant from maintaining this suit.

Seculovich v. Morton, 101 Cal. 673, was an action to enforce a trust. Plaintiff, to avoid the claim that the cause of action was barred by laches or the statute of limitations, alleged that within six months after the cause of action accrued defendant had left the state and at all times thereafter remained without it. The superior court having sustained a demurrer, the plaintiff appealed. In affirming the judgment the court said:

“We think the demurrer was properly sustained. The defendant’s absence from the state did not deprive the plaintiff of a remedy. He might have invoked the authority of the court, and, upon service of process in the manner prescribed by the statute, could have procured the appointment of a commissioner to convey the property to him.”

101 Cal. 677.

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*First.* At any time within one year an appeal could have been taken from the judgment foreclosing the certificate of purchase. Cal. C. C. P., section 939, as it stood prior to the amendment of 1897.

*Second.* Since there was no personal service of summons, Davis, or his successor, Gilman, could have moved the court under section 473, Cal. C. C. P., for leave to answer to the merits of the original action at

any time within one year after the rendition of the judgment. To this relief they would have been entitled *upon showing a meritorious defense*, regardless of whether the proceedings for publication of the summons were or were not regular.

*Third.* After the expiration of one year after the entry of the judgment and within a reasonable time where, as here, it is claimed that, although it appears from the judgment-roll service of summons was made, there was in fact no service, the court had jurisdiction independent of section 473, Code of Civil Procedure, to set aside the judgment.

Norton v. A., T. & S. F. R. R. Co., 97 Cal. 388;  
George Frank Co. v. Leopold & Ferron Co., 13  
Cal. App. 59.

*Fourth.* A simple, adequate and effective remedy existed under section 3414 of the Political Code which contains the following provisions:

"When a contest arises concerning the approval of a survey or location before the surveyor-general, or concerning a certificate of purchase or other evidence of title before the register, the officer before whom the contest is made may, when the question involved is as to the survey, or one purely of fact, or whether the land applied for is a part of the swamp or overflowed lands of the state, or whether it is included within a confirmed grant, the lines of which have been run by authority of law, proceed to hear and determine the same; but when, in the judgment of the officer, a question of law is involved, or when either party demands a trial in the

courts of the state, he must make an order referring the contest to the district [superior?] court of the county in which the land is situated, and must enter such order in a record-book in his office."

Cal. Pol. Code, Sec. 3414.

In December, 1900, Gilman, Lake and Snow knew that a certificate of purchase had been issued January 23, 1900, to Mary A. Bonynge; they also knew of the foreclosure judgment and that the validity of the Davis certificate and the Bonynge certificate both depended on the effect to be given to that judgment. They knew that both the state and Mary A. Bonynge were acting on the assumption that the judgment of foreclosure was valid and in disregard of, and in hostility to, any supposed rights in the holder of the Davis certificate. There was nothing to have prevented the holders of the Davis certificate from instituting a contest before the surveyor-general to test the validity of these conflicting certificates of purchase. Such a contest would have presented a question of law which the parties had a right, under the provisions of section 3414 of the Political Code, to have referred to the proper superior court for trial and there determined.

Sharp v. Salisbury, 144 Cal. 721;

Cargile v. Silsbee, 148 Cal. 259;

Miller v. Engle, 3 Cal. App. 325, 332;

Blakeley v. Kingsbury, 6 Cal. App. 707, 710.

Appellant devotes a considerable portion of his brief (pp. 73-77) to a consideration of Youle v. Thomas, 146 Cal. 539, and professes to derive from the prin-

ciples enunciated in that case some support for his contention that while a contest was pending the holders of the Davis certificate were precluded from instituting another contest or intervening in Moran v. Bonynge. That his complaint in intervention in the pending contest did not state facts sufficient to justify such intervention was, of course, decided by the superior court which sustained the demurrer to such complaint in intervention, and by the supreme court which, in Moran v. Bonynge, 157 Cal. 295, upheld the judgment of the superior court dismissing the complaint in intervention. But the contention that Moran v. Bonynge was decided upon the theory that the law laid down in Youle v. Thomas prevented *any* intervention by a *third person* in a land contest pending in a superior court, is entirely unfounded. All that was held in Youle v. Thomas was that "*after the reference, and after the action was begun,*" the surveyor-general was not vested with authority to receive *subsequent* applications or make any order of reference based thereon; for, in such cases, there would be no *privity* between the state and an intending purchaser whose application was made *after* the order of reference; and such purchaser could not be allowed to question the sale made, or about to be made, by the state, as he did not, by making a *subsequent* application, put himself in *privity* with the state. It was not intimated in that case that the holder of a certificate, issued *before* an order of reference has been made by the surveyor-general, does not sustain such a relation of privity to the state as to give him the right to make a contest and demand a reference

or intervene in a pending contest. Here the Davis certificate was prior in time to the Bonynge application and certificate, and the Moran application; and, this being true, the holder of the Davis certificate, by the terms of section 3414 of the Political Code, had the *right* to contest before the surveyor-general, at any time, all questions affecting the validity of the Davis certificate, provided he could frame a complaint sufficient to state a cause of action.

*Fifth.* If the judgment foreclosing the Davis certificate of purchase was void, as claimed by appellant, the validity of the certificate was unaffected by the judgment. The certificate was *prima facie* evidence of title in the holder. (Pol. Code, sec. 3514; C. C. P., sec. 1925; *Bieber v. Lambert*, 152 Cal. 557, 564.) At any time after the issuance of the certificate of purchase to Mary A. Bonynge, which it must be remembered was more than eleven years prior to the commencement of this action, Gilman, Lake and Snow, or any of them, could have maintained an action to quiet title or to determine conflicting claims, and in such action could have secured a determination as to the validity of the judgment of foreclosure.

*Hyde v. Redding*, 74 Cal. 493, 502;

*Pioneer Land Co. v. Maddux*, 109 Cal. 633;

*Brown v. Jorres*, 148 Cal. 269;

*Shepard v. Mace*, 148 Cal. 270.

*Sixth.* Mandamus was available as a proper remedy for Gilman, Lake and Snow. The holders of the Davis certificate, after they made the tender to the county

treasurer in 1900, could, by writ of mandate, if the judgment was void, have compelled that officer to accept payment. The holder of the certificate was obligated to pay the interest annually in advance, and the balance of the purchase price within one year after the passage of any act requiring such payment, or before, at the election of the purchaser. (Pol C., sec. 3494.) These payments the purchaser was required to make to the county treasurer. (Pol. C., sec. 3512.) The law especially enjoined on the treasurer, as a duty resulting from his office, the obligation to receive, all "moneys by law directed to be paid to him" (Pol. Code, sec. 4101, subd. 1), and to "give to the person paying "the same a receipt" therefor. (Pol. Code, sec. 4103.) When final payment has been made "the register upon "the surrender of the certificate of purchase by the "person entitled to the same, must prepare a patent "for the land and send it to the governor together with "a certificate that the laws in relation thereto have "been complied with, that payment in full has been "made, and that the party named in the prepared patent "is entitled to it." (Pol. Code, sec. 3519.) "The "patent must then be signed by the governor, attested "by the secretary of state, sealed with the great seal "of the state, and be countersigned by the register." (Pol. Code, sec. 3520.) The duties so imposed on the county treasurer, the register and governor are purely ministerial, and in a proper case their performance may be enforced by writ of mandate.

Frank v. Butler County, 139 Fed. 119, 71 C. C.  
A. 571;

Spencer v. Smith, County Treasurer, 74 Kan. 142, 85 Pac. 573, 574;  
Roll v. Nation, 82 Kan. 675, 109 Pac. 392;  
Hickert v. Van Doren, 76 Kan. 674, 92 Pac. 593.

Frank v. Butler County, *supra*, is directly in point as to this particular question. It there appeared that the validity of certain bonds, to collect which the suit was brought, required endorsements by various state officers, who refused to act. After citing several cases, the court said:

"These cases establish the right, under the laws of Nebraska, to test the action of the auditor and secretary of state for refusing such registration and certification by the writ of mandamus. Against such action the statute of limitation runs in four years. State v. School District, 30 Neb. 520, 46 N. W. 613, 27 Am. St. Rep. 420. The statute of limitations of the state bars an action on the interest coupons in four years after maturity. During all these years the holder of these bonds could have brought suit in the state or federal court on the coupons to test the validity of the bonds. The only reasons assigned in the bill of complaint for not resorting to an action at law on said coupons is that, by reason of the failure of the state officers to register and certify the bonds, no suit at law was maintainable. \* \* \*

"It is utterly incredible to assume that the owner of these bonds, who knew as early as 1880 that the auditor and secretary of state refused to register and certify them on the ground of their invalidity, was not taking notice of the public litigation pending in the state re-

specting the validity of the bonds, and the public rulings of the courts thereon. As pertinently observed by Judge Hook, speaking for this court in the recent case of Williamson *et al.* v. Beardsley, 137 Fed. 467, 'A party who has the opportunity of knowing the facts of which he complains cannot avail himself of his inactivity, and thus escape the imputation of laches.' During this great lapse of time between the issue of these bonds and the institution of this suit, lands in Butler county were being purchased by persons seeking homes therein. They had the right to assume that any holders of such outstanding claimed obligations of the county had acquiesced in the repeated decisions of the supreme court of the state declaring such bonds void, and that their property would not be burdened with assessments for their payment. The holder of said bonds is presumed to have known that no taxes were being imposed upon the property owners of said county for the payment of interest on the bonds, and that the administration of the county finances were not annually being arranged and adjusted with a view to such indebtedness. The men in office, the active participants in ordering and conducting the election and issuing the bonds, the state officers who refused their registration and certification, are all out of office. And after the lapse of 23 years many may be presumed to have moved from the state, and become scattered far and wide, and others of them may have died. After all these events and changes, these complainants come, pleading many facts existing alone in *pais*, invoking the aid of the court of conscience, which proceeds *et*

*aequo et bono*, to afford them relief against the infirmities of the bonds at law, apparent on their face when bought. \* \* \*

“On the theory of the bill of complaint, the only impediment in the way of the collection of the bonds in a suit at law was the lack of the required registration of, and certification indorsed on, them, and that the ground on which the refusal to register and certify the bonds was bottomed was the misconception of said state officers respecting the alternative feature of the proposition submitted to the electors vitiating the election. As already shown, the validity of that objection could have been tested by the writ of mandamus. Frank, the holder of the bonds, a non-resident citizen of the state, had the right, if he preferred, to invoke that remedy in the federal court, and take its independent judgment on said question. ‘A party by going into a national court does not lose any right or appropriate remedy of which he might have availed himself in the state court of the same locality.’ *Davis v. Gray*, 16 Wall. 203, 221, 21 L. Ed. 447. See, also, *Cummings v. Bank*, 101 U. S. 157, 25 L. Ed. 903; *Schurmeier et al. v. Connecticut Mutual Life Insurance Co.* (recently decided by this court), 137 Fed. 42. Instead of this course, Frank chose to stand inactive not only four years, whereby he permitted this adequate remedy at law to expire by limitation, but for twenty-three years, while all the changing conditions in Butler county, heretofore adverted to, were taking place, and then appeals to the equity side of the court to hear and try out the question of law and fact as to whether the

bonds should have been registered and certified by the auditor and secretary of state. Under such conditions the door of a court of equity ought not to be opened to such a suitor to disturb the long repose of this bond controversy."

139 Fed. 123-124, 126.

It is plain, therefore, that the holder of the Davis certificate, if the judgment of foreclosure was void, as claimed by appellant, any time after the entry of the judgment and particularly after the tender of payment made in 1900 and refusal by the treasurer to accept the money, could have tested the validity of the judgment by an application for a writ of mandate. This remedy, of course, would be barred by the state statutes of limitations in four years. (Barnes v. Glide, 117 Cal. 1; Jones v. Board of Police Commissioners, 141 Cal. 96.) But until so barred this remedy, which was plain, speedy and adequate, was available to the holders of the Davis certificate of purchase.

*Seventh.* Redemption could have been made by the holder of the certificate. The statute approved March 1, 1881, entitled "An act to enable purchasers of state "lands to redeem the same where their titles have been "or may hereafter be foreclosed for non-payment of "interest," reads:

"Section 1. In all cases where the title of purchasers of land from the state has been foreclosed, or attempted to be foreclosed, or that may hereafter be foreclosed, for non-payment of interest, said purchasers, their executors, administrators, or successors in interest

shall have, twelve months after said foreclosures are or *have been completed*, within which to redeem such land, by paying to the county treasurer, for the benefit of the fund, or parties entitled thereto, all delinquent interest, and interest that would have accrued in case there had been no foreclosure; also, all costs of foreclosure to be paid to the fund, or the parties who paid said costs. When said payments are made, and indorsed on the certificate of purchase, specifying the amount paid as interest and for costs, and duly reported to the register of the land office, the annulments shall be canceled by said officer, and the rights of the purchaser shall thereby be fully restored."

Stats. 1881, p. 66.

Davis or Gilman, by invoking this remedy, at any time within twelve months after completion of the foreclosure suit, could have redeemed and their rights would have been reinstated.

People v. Norris, 144 Cal. 422;

Marshall v. Farmers' Bank of Fresno, 115 Cal. 330, 333.

*Eight.* If the judgment was not void, but voidable, and there had been a defense on the merits in People v. Davis, then an action seasonably commenced to vacate the judgment would have been proper.

People v. Davis, 143 Cal. 673.

All of these, and possibly other, remedies were available at various times to the appellant or his predecessors in interest. Failure of the predecessors in interest

of appellant to avail themselves of these remedies, in connection with the lapse of this long period of time, the intervention of the rights and interests of third persons, and the change and increase in the value of the land, operate as a bar to the prosecution of this action.

*The judgment in People v. Davis is not void, and the owners of the Davis certificate could not indefinitely delay their attack upon it on the theory that it constituted a mere cloud on his title.*

In view of the repeated decisions of the supreme court of California, holding that the judgment in People v. Davis was not void, it can scarcely be argued with sincerity at this late day that the judgment was void and of no effect whatever.

A void judgment is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered it binds him in no degree whatever, it has no effect as a lien upon his property, it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated or set aside; for whenever it is brought up against the party he may assail

its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral. In the language of the supreme court of California, speaking through Chief Justice Searls, a judgment "which is void upon its face, "and which requires only an inspection of the judgment-roll to demonstrate its want of vitality, is a dead "limb upon the judicial tree, which should be lopped off, if the power so to do exists." (74 Cal. 405.) On the other hand, a voidable judgment is one which, though not a mere nullity, is liable to be made void when a person who has a right to proceed in the matter takes the proper steps to have its invalidity declared. But unless and until it is duly annulled, it is attended with all the ordinary consequences of a legal judgment. The party against whom it is given may escape its effect as a bar or an obligation, but only by a proper application to have it vacated or reversed. Until that is done it will be efficacious as a claim, an estoppel, or a source of title. If no proceedings are ever taken against it, it will continue throughout its life to all intents a valid judgment.

Black on Judgments, sec. 170.

The judgment here in question, it has been determined by the supreme court of California, is valid and collaterally unassailable, and could have been vacated only on appeal, motion to vacate or by a suit in equity; it is not and never had been void, but, at most, voidable, if seasonably attacked by proper proceedings. But in a suit to set aside a judgment, "the plaintiff "does not question or dispute its effect as an adjudica-

“tion, but he seeks to be relieved from its operation  
“upon equitable grounds.”

Eichhoff v. Eichhoff, 107 Cal. 42, 49.

Appellant, in support of his contention that he was under no duty to litigate (appellant's brief, p. 56), cites Lapham v. Campbell, 61 Cal. 300, and several other cases, all of which were cases in which no valid service of summons had been made, and in which the judgments were based upon false proofs of service. Here not only was there a service by publication, but it has been so adjudged and determined by the supreme court of California, in People v. Davis, 143 Cal. 673. Moreover, the language quoted from Lapham v. Campbell, *supra*, is not authoritative, since the judgment was rendered by department I of the supreme court, two justices concurring in the judgment but not in the opinion rendered by the third justice.

*The California statutes of limitation are applicable, and bar this suit.*

It is worthy of comment that appellant dismisses the question of the statute of limitations, which is clearly, of and by itself, sufficient to dispose of the entire case, with the citation of a single case (appellant's brief, p. 87), and that all that this case holds, and all which he contends it holds, is that statutes of limitation are only followed by analogy in courts of equity.

As to the effect to be given to state statutes of limitation by the federal courts, it was said in Bauserman v. Blunt, 147 U. S. 647, 652:

"No laws of the several states have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real and personal, as enacted by the legislature of a state, and as construed by its highest court."

147 U. S. 652.

Dupree v. Mansur, 214 U. S. 161, well illustrates the application of this rule. The suit was one brought in the federal court to quiet the title to certain land in the state of Texas. A cross-bill was filed by defendant to establish and foreclose a vendor's lien and mortgage upon the land. The supreme court of the United States, declaring that it was the established law of Texas that when a debt is barred by limitations an action to foreclose a lien or mortgage given as security for it is also barred, held that this rule must be enforced in the courts of the United States, whether sitting in law or in equity. After observing that there was a question whether the lien sought to be foreclosed was expressly reserved or was a purely equitable right, Mr. Justice Holmes, delivering the unanimous opinion of the court, said:

"But equitable or not it is a creation not of the United States, but of the local law of Texas. If that law should declare the words in Bailey's deed purporting to reserve a lien unavailing, it would not be for the courts of the United States to say otherwise when sitting in equity any more than when sitting at law. It appears to us equally their duty, when the local law decides that the words create a right, to take the meas-

ure of that right from the same source. The notes are barred, as well in equity as at law. By the law of Texas the security is incident to the note and does not warrant a foreclosure when the note does not warrant a judgment. This is not a matter of procedure or jurisdiction, but of substantive rights concerning land. It seems to us that it should be governed by the decisions of the state where the land lies. See *Slide & Spur Gold Mines v. Seymour*, 153 U. S. 509, 516."

214 U. S. 167.

The doctrine of this case is particularly applicable here; for every right asserted arises under the laws of California, and necessarily must be determined by the construction given to its statutes by the supreme court of the state.

It is true that federal courts of equity are not absolutely bound, under all circumstances, to apply state statutes of limitation in suits pending before them. Statements to the contrary are frequently made, however, and it is certainly the trend of the courts to limit the cases in which state statutes of limitation are not applied. This court has recently stated the rule in these words:

"In general, courts of equity, being courts of conscience, are not bound by the rigidity of the statutes of limitation, as are courts of law. When conditions are equal—that is, when the reasons prompting the exercise of judicial power are of equal potency and applicability—no further reasons being present, they

will act upon the analogy of, or, to be more exact, rather in obedience to the limitations of law."

Newberry v. Wilkinson, 199 Fed. 673, 684.

In Moore v. Nickey, 133 Fed. 289, this court, in a suit to recover stock in a mining company under a written contract, after a delay of nine years from the date of the contract, considered this question; and it was held that state statutes of limitation should be followed and applied in equity suits in all cases where the circumstances were not very exceptional and unusual. It was there said:

"The principal question, however, is whether or not the appellant is barred by his laches from prosecuting the present suit. The bill was filed on January 30, 1902, more than nine years after the date of the instrument upon which the suit is brought. \* \* \* Section 518 of the Code of Civil Procedure of Montana, in reference to causes of the nature of the case at bar, provides, 'An action for relief not hereinbefore provided for must be commenced within five years after the cause of action shall have accrued,' and the Supreme Court of that state has held that this statute applies as well to equitable suits as to actions at law. Mantle v. Speculator Company, 27 Mont. 473, 71 Pac. 665. Said the court in Godden v. Kimmell, 99 U. S. 210, 25 L. Ed. 431:

"'Equity courts in cases of concurrent jurisdiction usually consider themselves bound by the statute of limitations which governs courts of law in like cases,

and this rather in obedience to the statute of limitations than by analogy.' ”

133 Fed. 291-292.

When a suit is brought, as was this, long after it has been barred by a state statute of limitations, the burden is on the complainant both to allege with particularity and to establish the exceptional circumstances which take the case out of the general rule. In Wyman v. Bowman, 127 Fed. 257, 269, 62 C. C. A. 189, the circuit court of appeals, eighth circuit, Judge Sanborn writing the opinion, said:

“Has the complainant been guilty of such laches that he may not invoke the aid of a court of equity? Courts of chancery are not bound by, but in the application of the doctrine of laches they usually act or refuse to act in analogy to the statute of limitations relating to actions at law of like character. Under ordinary circumstances, a suit in equity will not be stayed for laches before, and will be stayed after, the time fixed by the analogous statute of limitations at law. But if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill, or by his answer, that extraordinary circumstances exist, which require the application of the

doctrine of laches. And when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case."

127 Fed. 269.

No attempt is here made to comply with this rule, and no reasons are advanced which serve in anywise to excuse the gross laches of appellant and his predecessors in interest in instituting a suit to vacate the judgment foreclosing the Davis certificate of purchase.

Whatever may be the object of this suit, and whatever may be the nature of the cause of action attempted to be stated, all right to relief of any kind was long since barred by the California statutes of limitation. It is the theory and the policy of the law of California that every cause of action, whether legal or equitable, shall at some time be barred from prosecution by reason of the mere lapse of time.

In section 312 of the Code of Civil Procedure of California it is declared:

"Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

In subsequent sections the time within which certain specifically enumerated actions may be commenced is prescribed. It is then provided in section 343 of the same code that:

"An action for relief not hereinbefore provided for, must be commenced within four years after the cause of action shall have accrued."

Every action, legal or equitable, is within the purview of this section, unless specifically embraced within the provisions of some of the preceding sections of the Code of Civil Procedure. If the particular cause of action is not specifically governed by some other section it is barred in four years by section 343. With respect to this section it was said in *Piller v. Southern Pacific R. R. Co.*, 52 Cal. 42, it "fixes the time within which "certain bills in equity may be filed," and "the four "years' limitation of section 343 applies to all suits in "equity not strictly of concurrent cognizance in law and "equity." This construction has been repeatedly approved.

*Lux v. Haggin*, 69 Cal. 255, 269;

*Dore v. Thornburgh*, 90 Cal. 64, 67;

*Meigs v. Pinkham*, 159 Cal. 104, 110.

In *Moore v. Nickey*, 133 Fed. 289, it will be remembered that this court placed a like construction upon similar provisions of the Montana Code of Civil Procedure.

The object of this suit is to enforce certain supposed rights based upon the Davis certificate of purchase. When that certificate was foreclosed every right arising out of it was destroyed forever, unless it should be re-established by a decree annulling the judgment of foreclosure. Now, it is well settled that where a suit is brought to vacate a judgment, the period of limitation applicable is to be determined by the ground upon

which the relief is asked. If the ground of attack is fraud or mistake, the action must be commenced within three years after the *discovery* of the fraud or mistake; and, unless so commenced, the action is barred by the provisions of subdivision 4 of section 338 of the California Code of Civil Procedure, which reads:

“Within three years: \* \* \*

“4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.”

C. C. P., sec. 338.

See

People v. San Joaquin etc. Assn., 151 Cal. 797, 807;

Watkins v. Bryant, 91 Cal. 492, 503;

People v. Perris Irr. Dist., 142 Cal. 601, 604.

If, however, appellant contends that he does not find his action on fraud or mistake, and that, therefore, subdivision 4 of section 338 is applicable, then it results inevitably that his pretended cause of action was barred in four years from the *rendition* of the judgment by the provisions of section 343 of the Code of Civil Procedure. Treated, then, as a suit to set aside a judgment (which, we submit, it is not), and even conceding that actual knowledge of the existence of the grounds of attack were not brought home to complainant's predecessor in interest until October 1, 1900 (which, of course, was not necessary to start the statute running),—still this suit was not instituted

until December 30, 1911, and it had then been fully barred for at least seven years.

If appellant be considered as relying upon a cause of action to enforce a trust he is no better off. As the judgment in *People v. Davis* is fair on its face it is, so long as it remains unvacated, as has been shown, an insuperable barrier to the maintenance of a suit to enforce any supposed trust. But, waiving this consideration for the moment, it then follows that such a cause of action is likewise barred by section 343 of the California Code of Civil Procedure. For, were the certificate of purchase to be treated as creating the same relations between the state and Davis as ordinarily subsist between vendor and vendee under an executory contract of purchase and sale, such trust would be a constructive one, and the four years' statute of limitations would begin to run from the inception of the trust, and no repudiation of the trust would be necessary to start the running of the statute.

*Nogues v. Newlands*, 118 Cal. 102, 106;

*Hecht v. Slaney*, 72 Cal. 363;

*Barker v. Hurley*, 132 Cal. 21, 26;

*Norton v. Bassett*, 154 Cal. 411, 416.

But there was an unequivocal disavowal of any implied trust when the state caused the judgment to be entered and certified copies to be recorded in the offices of the county recorder and register of the state land office. There was a further unmistakable disavowal of any trust or right in the claimants under the Davis certificate when the state received and approved the application of Mary A. Bonynge to purchase the land,

accepted her money, and issued its certificate of purchase to her January 23, 1900, and still a further disavowal when in 1900 the county treasurer refused to accept payment on account of the Davis certificate; *of all of which Gilman, Lake and Snow had notice prior to December 31, 1900, at which time they filed their complaint in intervention in the case of Moran v. Bonynge.*

The register of the state land office, in passing on the application of Mary A. Bonynge to purchase the land described in the Davis certificate of purchase, was necessarily called upon to determine, and by approving it and issuing to her a certificate of purchase for the same land did determine, so far as his action could determine the question, that the judgment foreclosing the Davis certificate was valid and presented no obstacle to the approval of her application to purchase the land. When a certificate was issued to her, by the terms of which the state obligated itself, upon compliance by her with the statutory requirements, to sell Mary A. Bonynge the land, and, upon making payment in full, as required by law, to issue to her its patent, it, by these acts, openly disavowed and repudiated any obligation to the claimants under the Davis certificate; and, upon the theory of a constructive trust, the four years' statute of limitations commenced to run in favor of Mary A. Bonynge from the date of the issuance of the certificate to her.

Nogues v. Newlands, 118 Cal. 102, 106;

Norton v. Bassett, 154 Cal. 411, 416;

Hecht v. Slaney, 72 Cal. 363, 366;  
Broder v. Conklin, 121 Cal. 282, 288;  
Barker v. Hurley, 132 Cal. 21, 26.

A defense founded on the bar of the statutes of limitation is not, as asserted by appellant, a technical defense. Statutes of limitation are regarded as statutes of repose; and, as such, affording a meritorious defense which may, without reproach, be relied upon by any defendant. It is no longer regarded as unconscionable. Statutes of limitations are found and approved in all systems of enlightened jurisprudence; they promote repose by giving security and stability to human affairs; they give stability to titles to property; important public policy lies at their foundation; they stimulate to activity and punish negligence. As has been said by the highest judicial authority and approved by the supreme court of California: "While "time is constantly destroying the evidence of right, "they supply its place by a presumption which renders "proof unnecessary."

Lilly-Brackett Co. v. Sonnemann, 157 Cal. 192,  
197;  
Wood v. Carpenter, 101 U. S. 135.

The facts disclosed by the record in this suit illustrate the wisdom of the policy which lies at the foundation of all statutes of limitation. In consonance with these principles this court has said:

"Limitations of actions are designed for the peace and repose of society against interminable litigation,

and are justly regarded as wholesome and salutary regulations."

Newberry v. Wilkinson, 199 Fed. 673, 684.

*Even if not directly controlling, the California statutes of limitation are to be applied by analogy, and no reasons are shown by appellant, upon whom lies the burden of excusing laches, why they should not control and bar a recovery in this suit.*

Boynton v. Haggart, 120 Fed. 819;

Burgess v. Hillman, 200 Fed. 929 (C. C. A. 8th circuit);

Curtner v. United States, 149 U. S. 662;

Dupree v. Mansur, 214 U. S. 161, 167.

Boynton v. Haggart, *supra*, was a suit to vacate a patent. Upon the question of laches the eighth circuit court of appeals, speaking through Circuit Judge Sanborn, said:

"The statutes of the state of Arkansas provide that suits of this nature must be commenced within five years after the cause of action accrued. Sandel's & Hill's Digest, secs. 4832, 4822. While courts of equity are not bound by, they ordinarily act or refuse to act in analogy to, the statutes of limitations relating to actions at law of like character. When a suit is brought after the time fixed by the analogous statute, the burden is on the complainant to plead and prove that it would be inequitable to apply it to his case, and when a suit is brought within the statutory time for the analogous action at law, the burden is on the defendant to show either from the face of the bill or by his answer

that extraordinary circumstances exist, which require the immediate application of the doctrine of laches. Kelley v. Boettcher, 85 Fed. 55, 62, 29 C. C. A. 14, 21. The action at law analogous to the petition to avoid this patent to Cross was barred under the statutes of Arkansas in 1871. \* \* \* The record contains neither pleading nor proof of any facts or circumstances which make it inequitable to apply the doctrine of laches to the case of the interveners by analogy with the corresponding statute of limitations at law according to the ordinary rule of practice, while the facts that these interveners and their intestate allowed the patent to Cross to stand unchallenged for 32 years, and permitted the devisee of the complainants to purchase and pay \$13,000 for the lands it described in reliance upon its validity, and without notice of any claim of any defect in it, make it unconscionable and unjust to depart from the ordinary rule."

120 Fed. 829-830.

Curtner v. United States, *supra*, was a suit in equity brought to set aside and cancel certain patents of public lands issued by the land department. In the course of the opinion, delivered by Chief Justice Fuller, it is said:

"This bill was not filed until more than thirteen years after the cause of action had accrued, and twelve years after the first patent, and over five years after the last patent, was issued, by the state, while the selections and purchases thereunder were made long before.

"Under the laws of California, an action may be brought by any person against another, who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim; but no action can be brought for the recovery of real property or for possession thereof, or arising out of the title thereto, unless such action is commenced within five years after the cause of action shall have accrued; and an action for relief not otherwise provided for must be commenced within four years. (Code Civ. Proc. Cal., secs. 318, 319, 343, 738.)

"Whether the statute be applied directly or by analogy, or the rule in equity founded upon lapse of time and staleness of claim, the delay and laches here are fatal to the maintenance of the suit.

"The ineffectual pressure of the company on the land department furnished no excuse as between the real parties to this litigation, and the United States occupied no such relation to the case as to be entitled to the exemption from limitation and laches accorded to governments proceeding in their own right."

149 U. S. 676-677.

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In view of the facts presented by the record, and the principles enunciated by the authorities cited, it must be apparent that appellant is barred both by laches and by the statutes of limitation of the state of California. This was the conclusion at which Judge Van Fleet arrived, and we submit it is the only conclusion which the facts will permit.

**People v. Davis, 143 Cal. 673, is Res Adjudicata as to the Issues Raised by Appellant.**

Appellant himself stamps this suit as one to enforce a trust and not a suit to vacate the judgment in People v. Davis when he asks, as he does in the prayer of his bill, that "it be adjudged and decreed that the said "defendants \* \* \* hold the title to an undivided "one-sixth of said section 36 \* \* \* in trust for the "use and benefit and enjoyment of plaintiff," and that defendants be required to convey the legal title thereto to him [tr. p. 37]; and when he alleges in his bill that "The said summons was not served upon the said defendant S. Davis \* \* \* personally or otherwise" [tr. p. 24], and "that said court was *without jurisdiction* to render any judgment in said action against "the said defendant S. Davis, and that the said purported judgment is *void, null* and of *no effect whatever.*" These are the identical grounds on which Lake, in his motion of December 31, 1900, sought to have the judgment vacated. [Tr. pp. 56, 59, 60.]

It will be remembered that the judgment foreclosing the Davis certificate was entered December 27, 1892; that December 31, 1900, an order was made on the motion of Lake vacating that judgment; that November 11, 1901, on the application of the people an order was entered annulling the order of December 31, 1900, and declaring that the judgment of foreclosure was valid and in full force and effect, and that June 23, 1900, the supreme court of California affirmed the last-mentioned order. It is the judgment of December 27, 1892, which appellant attacks, and it is the order

of November 11, 1901, so affirmed June 23, 1904, which appellees maintain is *res adjudicata* of all the issues raised by appellant. The point of law involved is a narrow one and may be thus stated: Is the judgment of the supreme court of California, determining that a *resident* defendant was properly and legally served with process by the publication of summons in an action instituted and prosecuted, pursuant to the statutes of that state, by the People of the state, to foreclose and annul a certificate of purchase of state school lands, for failure of the purchaser to make payments as required by law, conclusive upon the federal courts?

The ancient maxim of the English common law, "It concerns the commonwealth that there be a limit to "litigation," is still the law of the land; and the defense of *res judicata* cannot properly be characterized as technical or one not favored by a court of equity. The public policy upon which this defense is based is deserving of far more consideration than the private inconvenience its application may infrequently occasion. And when the court finds such a course of vexatious litigation as is disclosed by the bill in this case, it can well appreciate the wisdom of the rule. As was said by the circuit court of appeals for the eighth circuit in *Stewart v. Board of Trustees of Park College*, 156 Fed. 773, 775, 84 C. C. A. 451:

"That doctrine [*res judicata*] rests upon the wisdom and public policy of putting an end to litigation. It jealously secures and guards the right of every person to a day in court—to an opportunity to have his claim adjudicated by a court of competent jurisdiction—but, when that opportunity has been once fully afforded,

public policy demands that litigation on the same claim and between the same parties or their privies shall forever cease."

In Freeman on Judgments, vol. I, sec. 247, that learned author says:

"The word 'estoppel,' as associated with judgments, has ceased to be odious. It is more than freed from opprobrious appellations; the vocabulary of the judges has been wellnigh exhausted to supply it with honorable and endearing titles."

*Federal courts are required by the constitution of the United States and acts of congress to give full faith and credit to judgments of state courts.*

Article IV, sec. 1, U. S. Constitution;  
U. S. Compiled Statutes, vol. I, p. 677; Rev.  
Stat., sec. 905;  
Hampton v. M'Connel, 3 Wheat. 234;  
Thompson v. Thompson, 226 U. S. 551, 560;  
Goldey v. Morning News, 156 U. S. 518, 522;  
Sperry & Hutchinson Co. v. Blue, 202 Fed. 82  
(C. C. A. 4th Cir.);  
Union & Planters' Bank of Memphis v. City of  
Memphis, 111 Fed. 561, 49 C. C. A. 455.

This principle is elementary and scarcely needs the citation of authorities in its support. The logic of our argument, however, requires us to call attention to this general rule, and to several other principles which are of themselves inapplicable to the case presented by the facts appearing in this record, but which appear to be relied upon by appellant.

In Goldey v. Morning News, *supra*, it is said:

"The principle which governs the effect of judgments of one state in the courts of another state is equally applicable in the circuit courts of the United States, although sitting in the state in which the judgment was rendered. In either case, the court the service of whose process is in question, and the court in which the effect of that service is to be determined, derive their jurisdiction and authority from different governments."

156 U. S. 522.

In Union & Planters' Bank v. Memphis, *supra*, Mr. Justice Lurton, then circuit judge, said:

"The statutory provision (section 905) extends to every court 'within the United States,' and therefore to courts of the United States, and such courts are therefore bound to give to judgments of state courts the same faith and credit which the courts of another state are bound to accord to them."

111 Fed. 571-2.

The basis of this principle is, of course, that:

"The courts of the United States are tribunals of a different sovereignty, and exercise a distinct and independent jurisdiction from that exercised by the state courts."

Cooper v. Newell, 176 U. S. 555, 567.

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That domestic judgments which are not void upon their face are not subject to collateral attack is another elementary principle which we merely state in passing; and even the judgments of courts of foreign countries

cannot, as a matter of course, be attacked and a re-examination had of the merits of the controversy, upon any and all occasions.

Hilton v. Guyot, 159 U. S. 113, 202.

But, confining our attention entirely to the judgments of sister states, it is first to be noticed that, although full faith and credit must be given to such judgments, this does not prevent the court in which the judgment is pleaded as *res judicata* from determining for itself whether or not the court in which the judgment was rendered had, in fact, jurisdiction of the person of the defendant, or the subject-matter of the action. To determine this fact even the recitals of the record may be contradicted by extrinsic evidence.

Thompson v. Whitman, 18 Wall. 457, 468.

The most frequent application of this principle is found in that class of cases where a judgment of a state court against a *non-resident* defendant, based upon constructive service of process, is allowed to be collaterally attacked, the rule of law being that such a judgment is of no effect beyond the jurisdiction of the court by which it was rendered.

D'Arcy v. Ketchum, 11 How. 165;

Pennoyer v. Neff, 95 U. S. 714;

Goldey v. Morning News, 156 U. S. 518;

Cooper v. Brazelton, 135 Fed. 476;

Estate of Hancock, 156 Cal. 804.

In Goldey v. Morning News, *supra*, the principle is stated in the following language:

"It is an elementary principle of jurisprudence that

a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in its behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government."

156 U. S. 521.

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Particular attention should also be called to one other class of cases which is *sui generis*, and is governed by its own peculiar principles. We refer to those cases in which an unauthorized appearance of the defendant has been entered by attorneys never employed by him. Such an act is regarded as of no effect whatever, and the judgment rendered is totally void—an absolute nullity. Proof of these facts is not regarded as even constituting a collateral attack upon the judgment, but rather it has the effect of merely explaining the record.

2 Black on Judgments, sec. 903;

Bigelow on Estoppel (6th ed.), p. 321;

Shelton v. Tiffin, 6 How. 163.

Even a domestic judgment may be shown to have been entered upon the unauthorized appearance of an attorney.

Weber v. Powers, 213 Ill. 370, 72 N. E. 1070;

Turner v. Turner, 33 Wash. 118, 74 Pac. 55.

In Bigelow on Estoppel (6th ed.), p. 321, that author says:

“\* \* \* there is no rule more fully settled than that where the record merely recites an appearance by attorney, there is no estoppel to show that such attorney had no authority to appear, or had but a limited authority. The doctrine cannot be considered as at variance with the act of Congress; for the jurisdiction in such cases, it seems, would not be conclusively presumed in the domestic courts.”

In *Shelton v. Tiffin*, 6 How. 163, speaking of evidence to show that the appearance of an attorney was unauthorized, the court said:

*“This evidence does not contradict the record, but explains it.* The appearance was the act of the counsel, and not the act of the court. Had the entry been, that L. P. Perry came personally into court and waived process, it could not have been controverted. But the appearance by counsel who had no authority to waive process, or to defend the suit for L. P. Perry, may be explained. An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages; but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings, and there is no other principle which can afford him adequate protection. The judgment, therefore, against L. P. Perry must be considered a nullity, and consequently did not authorize the seizure and sale of his property.”

6 How. 186.

Cooper v. Newell, 173 U. S. 555, a case cited by appellant, was of this character; and all that was said in the opinion was said in reference to such a judgment, which, as has been shown, is regarded as being absolutely void by reason of the fraud of the attorney.

*A judgment of a state court, rendered upon constructive service on a resident defendant, who is at the time within the state and is served in compliance with the local law, is a valid judgment everywhere, and entitled to full faith and credit in the courts of sister states and in the federal courts.*

The land covered by the certificate of purchase issued to, and held by, Davis, was situated in Kern county, and the title thereto was vested in the state of California. It was in that county that the suit of People v. Davis was instituted. Davis was a resident of the state of California, living at Sacramento at the time of the institution of the suit. [Tr. pp. 57, 62, 63.] Constructive service was employed as authorized by the local law, because he could not be found within the state, after diligent search. Being a citizen of the United States and a resident of California, Davis was also a citizen of California.

#### 14 Amendment to Constitution, 1st clause.

In Boyd v. Thayer, 143 U. S. 135, 161, the supreme court said:

“In Gassies v. Ballon, 6 Pet. 761, 762, Mr. Chief Justice Marshall declared that ‘a citizen of the United States, residing in any state of the Union, is a citizen of that state’; and the Fourteenth Amendment embodies that view.”

We are not here dealing with the effect of constructive service upon a *nonresident* defendant, who is a *citizen* of another state. In such cases it is, of course, well settled, as previously stated, that a judgment upon constructive service by publication of the summons is of no effect beyond the territorial jurisdiction of the court by which it is rendered. Here, however, the question is as to the effect of constructive service *upon a resident and citizen of the state*.

The basis of the rule that constructive service of process upon a nonresident is ineffective is that the process of a court cannot reach beyond the limits of its territorial jurisdiction, so as to affect persons who owe no allegiance to the sovereignty which has created and established the court itself. The reason of this rule ceases where the question arises as to a *resident citizen*, and involves only the relations of the state and its citizens with respect to their rights as purchasers of its lands, the legal title to which is retained by the state. It is equally well established that in such a case jurisdiction may be obtained by constructive service in accordance with the local law; and this because the individual defendant has submitted himself to, and is bound by, the laws of the state of which he is a citizen; and that state can, as long as the requirements of the constitution in regard to "due process" are complied with, regulate and determine by statute what method may be employed in making service of process upon its own citizens.

Knowles v. The Gas Light & Coke Co., 19 Wall.  
58;  
Matter of Empire City Bank, 18 N. Y. 199, 215;

Huntley v. Baker, 33 Hun. (N. Y.) 578;  
Hunt v. Hunt, 72 N. Y. 217, 237;  
Harryman v. Roberts, 52 Md. 64;  
Bryant v. Shute's Executor, 147 Ky. 268, 144  
S. W. 28;  
Welch v. Sykes, 3 Gil. (Ill.) 197;  
Marshall v. R. M. Owen & Co., 171 Mich. 232,  
137 N. W. 204, 207;  
Douglas v. Forrest, 4 Bingham, 686;  
2 Freeman on Judgments, sec. 570.

In Knowles v. Gas Light & Coke Co., *supra*, the supreme court of the United States recognized the validity of constructive service upon a resident defendant, and said:

“We do not mean to say that personal service is in all cases necessary to enable a court to acquire jurisdiction of the person. Where the defendant resides in the state in which the proceedings are had, service at his residence, and perhaps other modes of constructive service, may be authorized by the laws of the state.”

19 Wall. 61.

Huntley v. Baker, *supra*, is a leading case, and the reasons upon which the rule is based are there stated as follows:

“Without stating the principle more at length, it may be assumed that by reason of the relation between the state and its citizen, which affords protection to him and his property and imposes upon him duties as such, he may be charged by judgment *in personam* binding on him everywhere as the result of legal proceedings

instituted and carried on in conformity to the statute of the state, prescribing a method of service which is not personal and which in fact may not become *actual* notice to him. And this may be accomplished in his lawful absence from the state."

33 Hun. (N. Y.) 581.

The validity of a judgment obtained against a resident citizen defendant, by constructive service of process, having been established, it remains but to show that the requirements of the local law in this case have been complied with; and that this fact has been determined by a state court of competent jurisdiction.

*A judgment of a state court which holds that jurisdiction was in fact acquired over a resident citizen by constructive service is res judicata in a federal court.*

Where an issue is raised as to the jurisdiction of the court, a mixed question of law and fact is presented for determination. The judgment of a court under such circumstances, to the effect that it has acquired jurisdiction, is as final and conclusive as its judgment upon any other matter and issue involved in the case. An appeal may lie from its decision, and it may there be annulled or reversed; but however erroneous the conclusion of the court may be, its judgment is not void, and when pleaded in another court, such court must accept it as a valid and legal judgment.

Phelps v. Mut. Reserve Fund Life Assn., 112 Fed. 453, 457, 50 C. C. A. 339, affirmed 190 U. S. 147;

Chinn v. Foster-Milburn Co., 195 Fed. 158;

Thomas v. Virden, 160 Fed. 418, 87 C. C. A. 370;  
Moch v. Virginia Fire & Marine Ins. Co., 10 Fed. 696;  
Site v. Copwell, 59 Fed. 970;  
Bragdon v. Perkins-Hammill Co., 82 Fed. 338;  
Hubbard v. American Inv. Co., 70 Fed. 808;  
Ederheimer v. Parsons Dry Goods Co. (Ark.), 152 S. W. 142.

In Moch v. Va. Fire & Marine Ins. Co., *supra*, the court, after discussing the question at length, and citing various authorities, said:

“These decisions are but examples, among many, to show that where a question, even a question of jurisdiction, has been once litigated between two parties by a court of general jurisdiction, it is to be treated as *res judicata* between the same parties in every other but an appellate forum; \* \* \*.”

10 Fed. 709.

In Chinn v. Foster-Milburn Co., *supra*, the court uses the following language:

“It is true, as ably contended by counsel for the defendant, that the ‘full faith and credit’ clause of the Constitution (article 4, sec. 1) does not require the acceptance of the record of judgment as conclusive upon the facts necessary to give jurisdiction to a state court, and that such a judgment may be attacked on jurisdictional grounds; and also that the jurisdiction of a state court over the person or subject-matter is always open to question. St. Clair v. Cox, *supra*; Thompson v.

Whitman, 18 Wall. 457, 21 L. Ed. 897; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Grover & Baker Machine Co. v. Radcliffe*, 137 U. S. 295, 11 Sup. Ct. 92, 34 L. Ed. 670; *In re Kimball*, 155 N. Y. 68, 49 N. E. 331. But this broad rule, as a careful reading of the adjudications will show, has application only to cases where the nonresident was not served with summons, and did not appear or waive the defect in service."

195 Fed. 161-162.

Judge Van Fleet, in passing upon this demurrer, distinctly affirms this position. He said:

"Nor does the fact that the judgment in that case was based upon constructive service render it less conclusive as a bar, it having been determined by the state court that the statute providing that mode of service was duly complied with. II Black on Judgments, sec. 513; *McCotter v. Flynn*, 61 N. Y. Supp. 786. The question of the conclusiveness of that judgment having been duly litigated and determined in the state court, cannot be again drawn in question between the parties thereto or their privies in a federal court. II Black on Judgments, secs. 520, 938 and 939." [Tr. p. 146.]

Further discussion of these cases is unnecessary. The law is thoroughly established, and no dissent is to be found from the views herein expressed.

*People v. Davis*, 143 Cal. 673, holds that the defendant in that case, Davis, was legally served with the process of the court; that the court acquired jurisdiction over his person; and that the judgment foreclosing

*and cancelling the Davis certificate of purchase was a valid judgment, and this ruling is binding on this court.*

Lake v. Bonynge, 161 Cal. 120, was an action in all respects similar to the present one. It was brought by Lake and Snow, who claimed as assignees and transferees of Gilman, to establish the existence of a trust in their favor in this same property and against these same defendants, or their predecessors in interest. It made the same attack upon the judgment in People v. Davis that is made here. The supreme court of California in that case had occasion to itself construe its own judgment rendered in People v. Davis, and it is unnecessary for us, and it would indeed be presumptuous on our part, to do more than merely state the conclusions of the supreme court upon this point as expressed in its opinion in that case.

It was there—

“\* \* \* insisted by appellants that on the appeal from the order of November 11, 1901 (to be referred to hereafter as the Davis appeal), this court ‘merely determined that Davis (or his successor in interest Lake, one of the plaintiffs here) could not move to set aside the judgment more than one year after its entry unless the judgment was void on its face. It did not determine the question whether or not the court had acquired jurisdiction of the person of Davis.’”

161 Cal. 124.

The court held, however, that this position of the appellant was not well taken, and that, as has been stated, the judgment in People v. Davis was, in fact,

that Davis had been properly served with process, and that the judgment rendered against him was valid. In stating this conclusion the court said:

“But in this assertion we are satisfied that counsel is in error, and that *the very question which was determined, and which was the essential point involved on the appeal, was whether the original judgment entered against Davis was or was not valid.*”

161 Cal. 125.

In pointing out the reasons which led to this interpretation of the decision in People v. Davis, and referring to the record in that case, the court said:

“The record on that appeal showed that the motion of December 31, 1900, was based on the judgment roll and records in the case with the affidavits of Lake, Gilman and Davis, and the ground generally alleged was that the judgment was void on its face, *accompanied by the particular ground that there was no service of summons, either actual or constructive, made on Davis, and that for these reasons and on other grounds the judgment was void.* On the hearing the superior court made a general order setting the judgment aside. The record further shows that the motion upon which the order of November 11, 1901, setting aside the previous order of December 31, 1900, was that the original judgment against Davis was valid on its face and that the court had no jurisdiction to make an order setting it aside. So it is apparent that the hearing here of the Davis appeal involved *not merely* whether the superior court had jurisdiction after the lapse of more than one year to set aside the judgment for an asserted failure

to serve the defendant Davis, *but whether the judgment which was attacked on the original motion of December 31, 1900, was void upon the face of the judgment roll* on account of a failure to show that the court had acquired jurisdiction of defendant Davis by service of process. This latter question was essentially involved in the appeal, because if from an inspection of the judgment roll by the superior court the judgment in question appeared to be void on its face, that court had jurisdiction to set it aside at any time, and it would have been error to have made the order of November 11, 1901, appealed from, annulling the previous order doing so. And the *very matter* which the court in the Davis appeal, in the discussion of that appeal addressed itself to, was a *determination of whether the judgment of the superior court entered on December 27, 1892, was or was not void.*"

161 Cal. 127.

A careful reading of the opinion in *People v. Davis* will show that the pivotal point there considered was whether or not the court had acquired jurisdiction over the person of the defendant Davis; and the effect of the judgment there is to distinctly and directly hold that such jurisdiction was, in fact, acquired. This is the construction which was properly placed upon the judgment in *Lake and Snow v. Bonynge, supra*; and the continued assertion of the claim by appellant that the judgment annulling and foreclosing the Davis certificate of purchase was rendered without service of summons is not only unwarranted in law, but is preposterous.

*Davis was a party to the judgment in People v. Davis, 143 Cal. 673, and as appellant Carpenter claims only under Davis by mesne conveyances, he is in privity with him and is bound by the judgment there rendered.*

We have here the simplest of all the various applications of the rule that persons in privity are equally bound by judicial proceedings with parties to the record. Davis was the owner of the certificate of purchase foreclosed and annulled by the judgment in People v. Davis. The appellees are purchasers, deriving their title through and under the People. Davis transferred and assigned all of his interest to Gilman. Gilman conveyed a one-half interest to Lake and a one-fourth interest to Snow. He retained a one-fourth interest, a portion of which after his death and by virtue of certain proceedings had in the probate court passed to one Deal, who is the immediate grantor of appellant Carpenter. The effect of the judgment in People v. Davis in the superior court was to cancel and annul all right or claim of Davis to said certificate itself, and to declare that he had no further interest in the land described in it. The effect of the order in People v. Davis, made on the motion of Lake, affirmed by the supreme court of California (143 Cal. 673), to which motion Davis was of course a party, was to determine that the prior judgment in the case was a valid judgment rendered by a court which had acquired jurisdiction of defendant Davis. The rights of Davis have then been litigated and determined and are forever foreclosed. But appellant can and does claim only through Davis as his predecessor in interest and title.

Being in privity with him he is likewise bound by the judgment against him. It is unnecessary to cite authority to sustain the proposition that privies in estate are concluded by judgments against their predecessors in interest and that a grantee by mesne conveyances is bound by a judgment against his remote grantor. But the following language of Mr. Freeman in volume 1 of his work on Judgments, section 162, upon this point, may properly be quoted here:

“Where one claims in privity with another, whether by blood, estate, or law, he is in the same situation with such person as to any judgment for or against him; for judgments bind privies as well as parties.” The term ‘privity’ denotes mutual or successive relationship to the same rights of property. This relationship is produced either by operation of law, by descent, or by voluntary or involuntary transfers from one person to another.”

See also

2 Black on Judgments, sec. 549.

It is true that it is alleged in the bill that an assignment was made by Davis to Gilman March 20, 1889, and that it appears that the suit of People v. Davis was not instituted until August 25, 1892, and that it is a general rule that grantees who become such prior to the institution of the judicial proceedings against their grantors which are set up are not bound by them. This is largely a matter regulated by statute, however, and it is the general policy of the law of the various states to make an exception to this rule in those cases in which the grantee or assignee has failed to record the

instrument upon which he bases his claim to an interest in the property. Such a statute is to be found in section 3552 Political Code of California which applies to this particular state of facts and is controlling in this matter. The prior sections of the Political Code, commencing with section 3546, deal with proceedings against delinquent purchasers and provide and designate the means by which the rights of purchasers who are in default may be foreclosed and annulled. After declaring in section 3548 that such an action must be in the name of the People of the state, it is provided in section 3552 as follows:

“A judgment against the purchaser binds the assignee, unless the notice of the assignment was filed with the register before the commencement of the action.”

Here there is no suggestion in the bill that notice of the assignment to Gilman was filed with the register before the commencement of the action against Davis. It therefore follows necessarily that Gilman, the assignee, and his successors in interest, are bound and concluded by the judgment against Davis.

Similar in effect is the general rule laid down in section 1214 of the California Civil Code, as follows:

“Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, *and as against any judgment affecting*

*the title, unless such conveyance shall have been duly recorded prior to the record of notice of action."*

In *Farr v. Hobe-Peters Land Co.*, 188 Fed. 10, 110 C. C. A. 160, the court had under consideration a similar Wisconsin statute and held that the assignee of a mortgagee who had failed to record his assignment was barred by a judgment obtained against the mortgagee in proceedings brought subsequent to the assignment. The court there said:

"The mortgagee, Minnesota Lumber Company, was properly made a party with due service of process, as we believe, under the authorities applicable to the proceeding; and the statutory notice of *lis pendens* was filed, so that the judgment on the face of the record became binding against the assignee. *No assignment of the mortgage was recorded until long after the entry of judgment;* nor was the purported assignment by the mortgagee then completed, by naming the assignee, to entitle the instrument to be entered of record. The statute (section 1206, Wis. Stat.) expressly provides that the 'judgment shall forever bar such defendants and all others claiming under them,' after the filing of the *lis pendens* notice, 'from all right, title or interest in said lands'; and the general statute (section 3187) in reference to *lis pendens* notice, likewise provides, that a purchaser or incumbrancer whose instrument is not recorded 'shall be deemed a subsequent purchaser' and 'shall be bound by the proceedings in the action to the same extent and in the same manner as if he were a party thereto.' In *Warner v. Trow*, 36 Wis. 195, 200, these provisions were upheld as concurrent and ap-

plicable to tax foreclosure proceedings and judgment; and the effect of the latter provision is well and pertinently stated and applied in Cutler v. James, 64 Wis. 173, 175, 24 N. W. 874, 54 Am. Rep. 603; Prahl v. Rogers, 127 Wis. 353, 359, 106 N. W. 287; Siedschlag v. Griffin, 132 Wis. 106, 112, 112 N. W. 18."

188 Fed. 17-18.

In Cutler v. James, 64 Wis. 173, 24 N. W. 874, a case referred to in the opinion from which we have just quoted, the court, referring to such a statute and speaking of its effect, said:

"Under that statute, and so far as that action was concerned, the plaintiff must be regarded the same as though he had purchased subsequently to the filing of the notice of *lis pendens* therein, and hence is bound by the proceedings and judgment in that action."

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Moreover, Lake, in moving to vacate the judgment in People v. Davis, was acting as the representative and in the interest of his co-owners Snow and Gilman, and they are bound by the result of his acts. Gilman was the assignor of, and a co-owner with, Lake and Snow. To aid Lake, and as his share of participation in the proceedings, Gilman made the affidavit set out in the transcript [pages 60-61] and used by Lake to obtain the first order vacating the judgment of the superior court in People v. Davis. Gilman, with Lake and Snow, claimed to be the owner of an undivided interest in the land under the certificate of purchase issued to Davis. But even more than this, he was directly interested in this litigation, knew that it was being carried

on, knew that he had a right to become a party to it, knew that an adverse decision would affect his property rights, and participated in the proceedings as a witness by making an affidavit to be used, and which was used, on the hearing of the motion to vacate the judgment. Under such circumstances he is clearly bound by the judgment rendered, and the supreme court of California so declared in *Lake v. Bonynge*, 161 Cal. 120, 127, where it said:

“Gilman had succeeded by the agreement of December 7, 1900, to the rights of Davis under his certificate of purchase and on the same day conveyed to Snow an undivided one-fourth and to Lake an undivided one-half interest in said certificate and the lands described in it. An agreement was entered into at the same time by Snow and Lake with Gilman which recited that ‘as the Davis certificate had been foreclosed and a decree annulling the same entered in a suit brought for that purpose, it is necessary, in order to maintain the claim of present title under said certificate of purchase, to take proceedings to set aside and annul the judgment and decree of foreclosure in said suit entered,’ and that Snow and Lake agreed ‘at their own expense and cost to take all necessary proceedings \* \* \* to claim, assert and maintain the title to said land as it originally accrued \* \* \* by reason of said certificate of purchase, and to recover and take the same as if no judgment of foreclosure had been entered,’ and that the services to be performed by them towards that end was the true consideration for the conveyance from Gilman to them. Pursuant to that agreement Lake moved the court to vacate the judgment and took the appeal from

the order annulling the previous order obtained by him vacating it. As successors of Davis through mesne conveyances, Lake, Gilman and Snow, as their interests were injuriously affected by the judgment in *People v. Davis*, although not parties to the original action, had the right to make themselves parties to that action by moving to set aside the judgment, and, on the denial of their motion, had a right to appeal to have the proceedings of which they complained reviewed, not only for excess of jurisdiction but for error. (*Elliott v. Superior Court*, 144 Cal. 501, 103 Am. St. Rep. 102, 77 Pac. 1109.) *In making himself a party by moving thereunder and taking that appeal pursuant to the agreement made by him and Snow with Gilman, Lake was acting in behalf of Gilman, Snow and himself in attacking the validity of the judgment in favor of the People of the state, plaintiff in that action, and under and through whom the respondent here, Mary A. Bonynge, acquired her title.* While the parties of record on appeal were the People, Davis and Lake, still the parties to the present action in which the conclusiveness of the judgment on appeal is involved are the same, *or are parties who were in privity with them as parties to that appeal and so are bound by the judgment therein.* As said in *Koehler v. Holt Mfg. Co.*, 146 Cal. 335, 337, 80 Pac. 73: ‘The case comes clearly within the principle that a judgment operates as an estoppel to preclude the parties and privies from contending to the contrary of that point or matter of fact, which, having been once distinctly put in issue by them, has been, on such issue joined, solemnly found against them.’ ”

We do not overlook the fact that the agreement of December 7, 1900, between Gilman, Lake and Snow referred to in the foregoing excerpt from the opinion in *Lake v. Bonynge*, is not before this court. But, notwithstanding appellant, in framing his bill, while setting out the transfer from Gilman to Lake and Snow of December 7, 1900, and alleging that it was made for a valuable consideration, has studiously avoided stating what constituted such consideration, it is shown that Gilman had notice of the proceedings which were taken by Lake for the benefit of the claimants under the Davis certificate, that it was apparently instituted with his approval, that he made his affidavit which was used on the hearing of the motion to vacate the judgment, and that he could, if he had so desired, and should, have formally joined with Lake in making the motion. Under these circumstances it would seem to be plain upon the authorities cited and to be cited that he is bound by the judgment.

Judge Van Fleet, in passing on the demurrer, was also of this opinion. He expressed himself thus:

"The judgment in the case of *People v. Davis*, 143 Cal. 673, as interpreted and expounded in *Lake v. Bonynge*, 118 Pac. 535, is clearly *res judicata* as to the predecessors in interest of complainant; and the latter having acquired the title counted upon subsequent to the rendition and charged with knowledge of that judgment is equally concluded thereby." [Tr. page 146.]

Where a third person who is liable with others, should a judgment be given against a defendant, has full notice of the pendency of the suit but does not

participate therein, the judgment is conclusive upon him.

Washington Gas Light Co. v. District of Columbia, 161 U. S. 316, 329.

The same principle involved in the above case is applicable here. Gilman (appellant's predecessor in interest) should, under the facts of this case, have participated in and made himself a party to Lake's motion. No advantage can now be taken by him or his successor in interest of his failure to exercise his right and duty at that time.

In Shoemake v. Finlayson, 22 Wash. 12, 60 Pac. 50, it appeared that in an action by a wife against a judgment creditor of her husband to enjoin an execution against land conveyed to her by her husband, the husband was a witness on the trial, was fully acquainted with the character and object of the action, and the issues, and was directly interested in the result, and the court held in a subsequent action brought by the husband that he was bound by the judgment rendered, saying:

"The plaintiff in this action was a witness on the trial of the former action, and was fully acquainted with the character and object of that action and the issues made therein. He was directly interested in the result, and in sustaining the title of his grantee, which was assailed therein, and, under such circumstances, he is estopped by the judgment as fully as if he had been a nominal party thereto."

60 Pac. 51.

Even if no technical estoppel existed in this case, the facts are such as to not only justify but require the court to refuse to again enter into a discussion of the merits of the case. The precise point in issue has been repeatedly passed upon by other courts. It was presented and decided adversely to the complainant's theory in *People v. Davis*, 143 Cal. 673. It was again presented and the same ruling made in *Lake v. Bonynge*, 161 Cal. 120. In view of this multitudinous litigation and the repeated determination by a court entitled to the highest respect that no rights now remain in existence under the former certificate of purchase issued to Davis, this court should refuse to again consider the question involved.

In *Norton v. San Jose Fruit-Packing Co.*, 83 Fed. 512, 27 C. C. A. 576, this court held that a decree directing the dismissal on the merits of a bill for the infringement of a patent would be followed without any re-examination of the merits on a subsequent appeal in a suit brought against a purchaser of the identical machine which was alleged to infringe in the former litigation, although such purchaser had made his purchase before the institution of that suit. It was there said:

“It is, however, claimed by appellants that the facts do not bring this case within the general rule, because it distinctly appears therefrom that the sale of the alleged infringing machine by Jensen to the appellee was prior to the commencement of the suit of *Norton v. Jensen* in the district of Oregon; that the decree rendered in this court in *Machine Co. v. Norton*, January

28, 1895, long after the commencement of this suit, is not a bar to this suit, and cannot be held to estop appellants from the consideration of their appeal upon its merits. In *Freem. Judgm.*, sec. 162, the author, in discussing the question as to who are privies to a judgment or decree, said: ‘It is well understood, though not usually stated in express terms in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit.’ See, also, *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 314, 14 Sup. Ct. 592, and authorities there cited. But, if it be true that a technical bar or estoppel has not been shown, the facts are of such a character as to justify this court in affirming the judgment of the circuit court, without entering into any discussion of the merits of the case. The appellee purchased its machine from Jensen. It is the same machine as was involved in *Machine Co. v. Norton*. This court held in that case that the machine in question did not infringe upon any of the Norton patents therein involved. 14 C. C. A. 383, 67 Fed. 236. If the manufacturer of the machine did not, by the making, use, or sale of it, infringe upon any of Norton’s patents, it must necessarily follow that the party who purchased the machine, either before or after the suit in question, cannot be held guilty of an infringement by the use of the same identical machine.”

83 Fed. 514-515.

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In every aspect of the case, then, the judgment rendered in *People v. Davis*, 143 Cal. 673, should be held

conclusive and a bar to further litigation involving the validity of the Davis certificate, and of the judgment foreclosing and annulling it. Davis and his successors in interest have had their day in court; their appeals have been heard by the highest court of the state, which has declared that they were destitute of merit. If there is ever to be an end to litigation, if there is ever to be an application made of the principle of *res judicata*, the facts of this case present such an occasion.

*The principle of res judicata applies to an order entered upon a motion involving a substantial right or the merits of the case.*

It will scarcely be contended by appellant with any degree of seriousness or sincerity that because the order made in the case of People v. Davis, 143 Cal. 673, was made upon a motion, that therefore it is not *res judicata* and conclusive upon the issues therein involved. The law establishing that such an order is *res judicata* is so clearly settled that we merely cite the cases which lay down the rule.

Lake v. Bonynge, 161 Cal. 120, 129;

Commissioners of Wilson County v. McIntosh,  
30 Kan. 234, 1 Pac. 572; opinion by Judge Brewer;

Boylan v. Bock, 60 Wash. 423, 111 Pac. 454.

And see

Chinn v. Foster-Milburn Co., 195 Fed. 158;

Bragdon v. Perkins-Campbell Co., 82 Fed. 338.

**Lake and Snow v. Bonynge, 161 Cal. 120, is also Res Judicata of the Issues Raised Herein.**

Much that has been said in discussing the conclusiveness of the judgment in People v. Davis is equally applicable here. The same relief is sought here that was refused there—a decree that defendants hold title to the land in trust for the plaintiff, and an order directing a reconveyance. Here, as in that case, the claim of the plaintiff is based upon the alleged invalidity of the judgment in People v. Davis, annulling and setting aside the Davis certificate of purchase. The parties who unsuccessfully prosecuted that action—Lake and Snow—were parties in interest with Gilman, appellant's predecessor in interest. That suit was instituted only after demurrers had been sustained to their complaint in intervention in the case of Moran v. Bonynge. It would be difficult to find a case in which an owner of land was more directly represented by his co-owners in litigation concerning the title to land than he is in the present one. From the very date of the assignment by Gilman to Lake and Snow of a part of his alleged interest in the Davis certificate of purchase, such action as has been taken by any of the parties has been taken in the interest and for the benefit of the others, who have done everything possible to further the various proceedings which have, at different times, been instituted. The handicap of an unmeritorious case has, however, been too heavy, and all their various and combined efforts have proved unavailing and unsuccessful.

While it is a fact that a writ of error has been granted by the supreme court of the United States in

Lake v. Bonynge, it is also true that such writ was granted on an *ex parte* application by a single justice of the court, as we are advised, and after a like petition had been denied by the chief justice of the supreme court of California. In any event, the allowance of the writ of error does not, we submit, operate as a *supersedeas* or have the effect of suspending the force and effect of the judgment of the superior court in Lake v. Bonynge.

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The questions involved have possibly been considered at greater length than was required. But the magnitude of the interests affected, as well as the persistency with which repeated groundless attacks on the judgment foreclosing the Davis certificate have been made, impel us to expose the absence of merit in any of the pretensions of appellant.

In conclusion we adopt the language of the late Justice Brewer, in Martin v. Pond, 30 Fed. 15:

“\* \* \* this is one of those suits which ought not to be encouraged. A loan was made, security taken, default occurred in the payment, and foreclosure was had. All was done in good faith, with no circumstances of fraud, concealment, or oppression. The proceedings were apparently regular. \* \* \* Years after, when values have changed, a speculator comes prying into the records to see if some technical defect cannot be found in the judicial proceedings, and a title, obtained in good faith, and in reliance upon those proceedings, be destroyed. A distinguished lawyer arguing

before me, some years ago, a somewhat similar case, characterized the effort, with more of vigor than compliment, as land piracy. Public policy requires that judicial proceedings be upheld, and that titles obtained in those proceedings be safe from the ruthless hand of collateral attack. If technical defects are adjudged potent to destroy such titles, a judicial sale will never realize the value of the property, for no prudent man will risk his money in bidding for and buying that title which he has reason to fear may years thereafter be swept away through some occult and not readily discoverable defect."

30 Fed. 20-21.

It is respectfully submitted that the decree of the district court should be affirmed.

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No. 2277

IN THE

**United States Circuit Court of Appeals**  
**For the Ninth Circuit.**

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JUDD E. CARPENTER,

*Appellant,*

vs.

M. J. & M. & M. CONSOLIDATED (a corporation),  
ETHEL D. COMPANY (a corporation), MARI-  
COPA 36 OIL COMPANY (a corporation),  
WELLMAN OIL COMPANY (a corporation),  
CLIFF OIL COMPANY (a corporation), M. & T.  
OIL COMPANY (a corporation), ASSOCIATED  
TRANSPORTATION COMPANY (a corporation),  
STANDARD OIL COMPANY (a corporation),  
ASSOCIATED OIL COMPANY (a corporation),  
EMILIA E. GRAHAM, as executrix of the estate  
of F. M. GRAHAM, deceased, R. E. GRAHAM,  
GEORGE E. WHITAKER, WILLIAM F. PHILLIPS,  
MARY A. BONYNGE, W. A. BONYNGE, W. C.  
PRICE, JOHN DOE, RICHARD ROE, SAMUEL  
COE, HARRY GREEN, JOHN BROWN, RICHARD  
BROWN, SAMUEL GRAY, RICHARD GRAY and  
HARRY BLACK,

*Appellees.*

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**Opening Argument.**

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May it please your Honors, this is an appeal  
from an order sustaining a demurrer to a complaint,

without permission to amend. The complaint consists of some 110 printed pages. Before entering upon a recital of the voluminous facts stated in this complaint I will endeavor to point out what seems to me to be and I think was apparent to the judge below, Judge Van Fleet, the pivotal facts in the case.

The action is directed, first, to the vacating of a judgment upon the ground that it was procured without service of summons, either actual or constructive; and second, to charge the beneficiaries under this judgment—this judgment being a judgment of forfeiture, forfeiting the title to a piece of real estate in Kern County—I say to charge the beneficiaries under this void, invalid judgment as trustees. The demurrer was sustained upon two grounds, as appears from a memorandum opinion filed in the court below, the first being that the validity of this judgment of forfeiture was *res adjudicata* by reason of another judgment in the case of People v. Davis, a case which is reported in 143 Cal. 673. Judge Van Fleet did not hold that the judgment of forfeiture was a valid judgment, but he held that a decision of the Supreme Court of California rendered in a subsequent case rendered the question of the validity of that judgment *res adjudicata*. That was one holding. The other holding was that plaintiff's right to question the judgment was barred by laches. The memorandum opinion appears on page 146 of the transcript. These laches did not accrue by virtue of the silent

acquiescence of the plaintiff, did not accrue by the failure of the plaintiff to move, but by virtue of the ineffective manner in which plaintiff attacked this judgment in the past; that is, it is not questioned that there was constant and continuous litigation through the years directed at the invalidity of this judgment, declaring that this judgment was a judgment taken without process of law, without service of summons. That is not the question. The reason on which the laches is urged is that we did not choose the right remedy; that while we pointed out the defect and prosecuted action after action—at no time did we have less than two actions pending—the defendants were able to successfully resist us by interposing objections to the manner in which we proceeded against this which had been taken against us, and which in each action we unequivocally pointed out had been taken without any service of summons or notice, and by which we were unable to get the facts of the failure of service of summons before the court; and thus our misfortunes in the past accumulated against us in this action and their good fortunes in successfully preventing us from getting our rights determined in the past accumulated in their favor in this action. The language of Judge Van Fleet is this:

“The fact that during the long interval permitted to elapse between the rendition of the judgment in People v. Davis and the filing of this bill, the efforts and activities of plaintiff’s predecessor in interest were expended in the unavailing pursuit of improper remedies does

not avoid the bar of laches against too late an assertion of the proper one."

Notwithstanding the great mass of irrelevant matters appearing in counsel's brief, those are the two points on which I believe we all agree that the case turns. I felt that before commencing a recital of the voluminous facts set out in th 110 pages it was well to call your Honors' attention to those two points.

The litigation grows out of a certificate of purchase issued by the State of California to a Section 36 of School lands, in the County of Kern, to one S. Davis, back in 1890, Davis paying 20 per cent of the purchase price and the annual interest in advance. Thereafter, in 1892, an action was commenced by the People of the State of California in the County of Kern under the statute of forfeiture to forfeit that certificate of purchase upon the ground that Davis had failed to pay his annual interest for the preceding year. In that action a judgment of forfeiture was entered. That there was no service of summons in that action I think cannot be questioned. Judge Van Fleet did not hold that there was service of summons back of that judgment. Under the rulings of the courts of the State of California I do not think it can be seriously questioned but what that judgment was taken without process of law. It was a substituted service and the law was not complied with.

In the first place, the complaint was not verified and there was no affidavit stating facts constituting

a cause of action, and there was no statement of fact as to any inability to find the defendant or any search for the defendant. The judgment was wholly unauthorized by any process of law. I am not going to go into an argument of the question of the invalidity of the judgment; I would not even have noticed it this much were it not for the statement, which is rather surprising, occurring on page 27 of the brief of the appellee:

“It therefore appears not only that the Supreme Court of the state has pronounced the very judgment in question here valid, but that by an unbroken line of decisions has held judgments based upon service by publication, where the record was precisely the same as the one under consideration valid, binding and effectual to determine and forfeit the rights of the holder of a certificate of purchase.”

Judge Van Fleet held not that the judgment was valid but that the judgment was pronounced valid in a subsequent action. In consideration of the duty of counsel to the court I feel it my duty to call your Honors' particular attention to that statement because it is a statement that cannot be supported by a single authority in the State of California. The authorities cited do not even pretend to support it. To the contrary, the Supreme Court of the State of California in the case of *People v. Mulcahy*, 159 Cal. 34, cited in our brief, has taken the very facts on which this judgment is founded and declared that a similar judgment in that case was absolutely void. By virtue of the natural duty of counsel to the court, and the dependency upon the

correctness of statements in briefs that the court is entitled to indulge, I feel it my duty to point out this particular statement in the brief and to unequivocally denounce it as incorrect and wholly misleading.

So much for the judgment in People v. Davis. I am going to treat it as absolutely void, upon the authorities cited in the brief, as being based upon no service of summons.

Now this invalid judgment, taken without any service of summons, stood there and was discovered in 1900. Immediately upon the discovery of this judgment—I will say that previous to the taking of the judgment against Davis, Davis had sold the land to Gilman—Gilman moved the Superior Court of Kern County to vacate this judgment. That was in October, 1900. The motion came up and was argued and was granted and the judgment of forfeiture was vacated. At this time a party by the name of Bonynge had filed an application to purchase the same land from the State of California, and also a party by the name of Moran had filed an application to purchase the same land from the State of California and a land contest was instituted between Moran and Bonynge. Davis and Gilman immediately endeavored in that land contest to set up the invalidity of the judgment and sought to have the question determined so as to bind Bonynge and Moran. While that land contest was pending the People of

the State of California in 1901 made a motion to vacate the order vacating the judgment upon the ground that as the judgment upon its face recited service of summons, and at the time that the judgment was entered the affidavit and the order for publication under the law of the State of California as it then existed were not a part of the judgment roll, and thus while it was in the record and files of the case, for the purpose of determining whether the judgment was valid or not valid on its face the court did not have the power to look beyond the technical judgment roll, and the statute did not then make these documents a part of the judgment roll. The law of the State of California was amended two years after that, and of course if the judgment had been rendered two years after it was rendered, that judgment would have been unquestionably void on its face because now and ever since the affidavit and the order for publication are and have been a part of the judgment roll. At that time the court below held that on such a motion you could not scrutinize beyond what is technically termed the judgment roll, which excluded these papers—that is, you could not go behind it—and as the judgment recited service of summons it would be presumed to be valid on its face. The court held that where a judgment is valid on its face, where it has that semblance of validity, it cannot be reached in the same action unless a motion be made within a year; that if a motion is made more than a year after its rendition the court has lost jurisdiction of the

action and the remedy of the party is in a separate action on the equity side of the court. Therefore the Superior Court vacated the order vacating the judgment. An appeal was taken to the Supreme Court of the State of California and that matter came before the Supreme Court of the State of California in 143 Cal. 673, in the case of People v. Davis. And this is the decision which is relied upon as declaring the validity, and being *res adjudicata* as to the validity of the judgment of forfeiture in People v. Davis and herein relied upon by defendants.

I will read briefly from the case:

"It is well settled that a court has no power to set aside or vacate on motion a judgment not void upon its face, unless the motion is made within a reasonable time, and it is definitely determined that such time will not extend beyond the limit fixed by section 473 of the Code of Civil Procedure, which in no case exceeds one year. It is also settled law that a judgment is not void upon its face unless its validity is apparent from an inspection of the judgment roll. It is hardly necessary to cite authorities to sustain these propositions. (See People v. Temple, 103 Cal. 447, 453, and Canadian etc. M. and T. Co. v. Clarita L. and I. Co., 140 Cal. 672, and cases there cited.)

"The effect of these well-settled rules is, that unless the invalidity of a judgment is apparent from an inspection of the judgment roll, the court rendering it has no power, in the absence of application made within the time specified in section 473 of the Code of Civil Procedure, to make any order vacating or setting aside such judgment, and the sole remedy of the

aggrieved party, who may not, in fact, have been served, *is to be found in a new action, on the equity side of the court.* (See Eichhoff v. Eichhoff, 107 Cal. 42; People v. Temple, 103 Cal. 447.)

“Under such circumstances, the judgment, which is not invalid on its face, is entirely beyond the reach of the court that rendered it, *except in a separate action*, and any order of the court purporting to vacate it is beyond the jurisdiction of the court, and therefore void.”

That decision was rendered in 1904 and this is the ruling that they now seek to set up against us in this action in equity as rendering the validity of that judgment *res adjudicata* herein.

While this case was going up to the Supreme Court the land contest wherein they sought to have this judgment declared invalid was pending, and plaintiff's predecessor filed a complaint in intervention setting up the invalidity of said judgment. That complaint in intervention was disallowed. The People of the State of California was not a party to that action. The title still remained in the State of California. The State of California did not issue its patent until the year 1909. And this litigation was going on, all previous to the issuance of the patent and leading up to it. Now here was this judgment that they could not attack in the original action; and under the decision of the Supreme Court of the state the party against whom the judgment was rendered had to go into a court of equity; yet he had no right to go into a court of

equity and sue the sovereign state. He was in that predicament. The laws of the State of California afforded him no relief against the state which had taken the judgment; and the title was still in the state; there was no provision whereby he could sue the state. But these other people who were trying to get his land had initiated a land contest and he endeavored to intervene in this land contest, and there it was held that he had no right to have the question determined in the land contest, and his intervention was dismissed. He took an appeal in that case from the final judgment dismissing his intervention, and that was affirmed against him in 1910 by the Supreme Court. But that ruling we are informed is not relied upon as *res adjudicata* against us.

In 1909 the state issued its patent to Bonynge and while the appeal in the land contest was pending and undetermined before the Supreme Court; nevertheless the state issued its patent for some reason or other.

About a month before the state issued its patent Gilman died. Gilman was the immediate predecessor of the plaintiff. Gilman had entered into a contract whereby he had given a certain interest in the land to a man named Lake and to a man named Snow, whereby they agreed to conduct the litigation in his behalf. Lake and Snow, immediately upon the issuance of the patent, commenced an action in the Superior Court of the County of Kern to have the

patentee adjudged his trustee. He simply alleged his certificate of purchase, and that it was valid, unvacated and subsisting at the issuance of the patent and charged that the patentee was trustee. The defendant came in and set up the judgment in People v. Davis. There were two pleas; first, that the judgment of forfeiture was a valid judgment; and second, that the validity of the judgment was *res adjudicata* by virtue of the motion and the appeal in People v. Davis which I have just read to you.

So there were two points in that case: one, was that judgment of forfeiture a valid judgment? and the second was that the validity of that judgment was *res adjudicata* in that action by virtue of the decision which I have just read you, which pointed out that the remedy was on the equity side of the court. That case was decided against the plaintiff and an appeal was taken to the Supreme Court of the State of California and that court affirmed the judgment below.

Judge Van Fleet says:

“The judgment in the case of People v. Davis, 143 Cal., as interpreted and expounded in Lake v. Bonynge, 118 Pacific, 535, is clearly *res adjudicata* as to the predecessors in interest of complainant.”

Therefore it is necessary for us to consider the case of Lake v. Bonynge and see what was decided. I may say at this time that since the taking of this appeal the Supreme Court of the United States has

issued its writ of error in the case of Lake v. Bonynge and that case is now pending before the Supreme Court of the United States. In other words, let us see what was determined in the case of Lake v. Bonynge by the Supreme Court. That case is reported in 161 Cal. 120, and the salient points considered appear from the following quotations from the opinion.

“On this appeal the main questions presented for review are, whether the finding that the original judgment of December 28, 1892, was a valid judgment, and the further finding that the judgment on appeal here from the order above referred to was *res adjudicata* estopping the defendants from attacking it in this action, are supported by the evidence.

“In the view we take of this case *it is unnecessary to consider both of these points* because we are satisfied that the judgment rendered here on the appeal from the order of November 11, 1902, People v. Davis, 143 Cal., 673, is *res adjudicata* on the subject of the validity of the original judgment and conclusive *against collateral attack upon it* which was sought to be made in the present action in the court below.”

That is, the court seemingly in this opinion held that the issues made in Lake v. Bonynge were no broader than the issues made in People v. Davis, that they were both collateral attacks.

“In the two other cases cited the attack upon the decrees was not a collateral attack as here, but a direct attack upon them upon the ground that they had been procured, the one by fraud, the other by mistake. In such cases it is well

established that the principle of *res adjudicata* invoked here does not apply."

Thus the Supreme Court held unequivocally in that action that the principle of *res adjudicata* does not apply as to a direct attack in that court.

Of course our contention is that we are making here a direct attack on that judgment whereby we set out all of its infirmities. In Lake v. Bonynge the complaint did not set out the infirmities that lay back of the judgment; the complaint in that case ignored the judgment; it simply set out the application of the plaintiff for a certificate of purchase and then the issuance of a patent. The defendant came in and set up the judgment as a bar and pleaded it as a good and valid judgment.

Under the law of the State of California there is no replication allowed. Any replication that may exist is an implied replication. Thus in an ejectment case where a defendant sets up a deed the fact that the deed was procured by fraud may be proved under the implied replication—there need not be a separate action to cancel that deed.

Thus it was our contention in that case that the issue of direct attack was involved there under an implied replication. Seemingly the Supreme Court of California did not take that view but held that the issue was confined to the narrow issue of collateral attack, no broader than the attack in People v. Davis I have quoted you—the motion—and could not look beyond the judgment roll, although in this

action the court did admit all the evidence showing there was no service of summons in that case. It is true it was admitted over objection, but still it was in the case. Despite the fact that in an equity case the evidence was there the court refused to look at it or to consider it in any manner.

Subsequently to that time Lake and Snow and one J. B. Treadwell who had acquired a certain interest in the land commenced an action in the Superior Court of Kern County directly attacking this judgment; that is, to bring forward the issue that the Supreme Court of the State of California seemed to hold was not before the court in Lake v. Bonynge, to directly attack the judgment. Immediately upon the filing of that complaint, which was filed I believe in 1911, a proceeding was commenced in the Superior Court of Kern County to adjudge the plaintiffs in that action guilty of contempt for having directly attacked this judgment of forfeiture upon the ground that the decision in Lake v. Bonynge took in both issues, the direct and the collateral attack, it broadened out, and they were enjoined from ever questioning the validity of that judgment. And they were punished for contempt. A writ of certiorari was issued by the Supreme Court of the State of California in that case. The writ was subsequently discharged. In that case the Supreme Court of the State of California seemed to take another view of the issues in Lake v. Bonynge. That opinion was written by Judge Henshaw, and from it I read the following:

"It is not to be doubted that in the action of Lake v. Bonynge, under its pleadings and issues, the court had full jurisdiction to declare the judgment which it entered. Indeed, in that action the very purpose of the litigation was to determine for and against the litigants finally and forever their rights to the land in controversy, and the injunction to enforce those rights was both permissible and proper. Upon the face of the judgment, moreover, no question can arise as to its intended scope. It is broad enough, and designedly broad enough, to prohibit these petitioners, their successors and privies, from ever again in any manner attacking the validity of the judgment in People v. Davis, or asserting or claiming any right to or interest in the real property affected by that judgment, and it formally declares that the claims and pretensions of the petitioners are without merit either in law or equity."

Of course seemingly, there is an absolute inconsistency between the two opinions of the Supreme Court of the State of California, one written by Justice Lorigan and the other written by Justice Henshaw. Thereafter Chief Justice Beatty granted a writ of error to the Supreme Court of the United States in the latter case. So this case of Lake v. The Superior Court is also before the Supreme Court of the United States.

The question still remains, what was the law in the State of California if the action of Lake v. Bonynge contemplated both the direct as well as the collateral attack, and as the evidence was in the case before the court, showing there was no service of summons, but the court had re-

fused to consider the evidence on that issue, and as it refused to consider the evidence, the result was necessarily depriving the man of a day in court, giving judgment against him without considering his evidence; and that was the theory on which the writ of error was granted by the Supreme Court of the United States.

The statement is made in the brief that the writ of error was granted *ex parte* on application to one judge. That is not exactly accurate by reason of the fact that while the writ of error was granted it is true *ex parte*, and was granted by Justice Vandeenter, yet the writ of error was considered by Justice McKenna as well as by Justice Vandeenter and concurred in by both: at the time however that the papers reached there Justice McKenna was not in town and Justice Vandeenter granted the writ. I simply make that statement because the statement occurs in the brief that only one justice granted the writ.

The case that was commenced against all these parties in the Superior Court, in 1911, by which they were sought to be punished for contempt, that action is now before the Supreme Court of the State of California, soon to be argued.

I have given you in rough an outline of the main features, showing that all this time these matters have been in litigation before the court in one form or another. Up until the patent was issued the plaintiffs were laboring under the dis-

ability or their inability to make an attack by reason of the fact that the title was still in the sovereign state; immediately upon the patent issuing this suit was commenced.

Previously to that time, while under the law they had no rights they did not sit idly by because they did not have any rights in a court and let this title be acquired but they made ineffectual endeavors to set aside that judgment by suing whom they could sue. They stood there all the time notifying everybody who sought to purchase the state title, that that land belonged to them, that the judgment that took it away from them was a void judgment, secured without service of summons. They did nothing to mislead anybody in making investments there in ignorance of their rights; they did everything that lay in their power, everything they could do to stand by their guns and fight for their rights. Their efforts were ineffectual. It seems that the ineffectual battle they were waging all this time because the law did not give them a right to commence this suit in equity before the patent was issued is to be counted against them and charged against them as laches. I cannot see how that view can be entertained because in laches there must be some evil result to the pleader following from the laches; that is, a person must be presumed to have been misled into doing something that otherwise he would not have done. Here we were powerless in the first instance, and in the second instance we were battling with these

people, we were trying to sue them, and every time we made an endeavor to sue them it was held that our attacks on the judgment were collateral attacks and we were not permitted to be heard under this ruling.

Now, as to the judgment in *People v. Davis* being *res adjudicata*, this bill sets up all of these proceedings much more fully than I have briefly stated them to your Honors. It sets out what has happened right along the line down to the present time. Administration was granted on Gilman's estate, and the plaintiff here purchased from the administrator a part of the Gilman interest in this land, and has commenced this action. Plaintiff is a citizen of New York. It must be borne in mind that although up to 1910 Gilman was in court fighting there, that is, he had a case pending; and at all times Lake and Snow and afterwards Treadwell were battling here right along; and at no time since 1900 has there been less than two actions pending directed at this judgment in one court, and at the present time I think there are three or four.

As to this decision in *People v. Davis* being *res adjudicata* here, that depends upon the view that this court shall take upon the issues made in this action. I have pointed out that in *Lake v. Bonyng* the Supreme Court confined the issues to those raised on collateral attacks and refused to look beyond the face of the judgment. Can, in this

action, this court look beyond the judgment and into the record of the court which sets out all the defects, the lack of jurisdiction, the failure to serve summons,—can this court look to this fact, can it take it into consideration? In other words, can a party come into this court and set up a judgment and allege that this judgment was taken without service of summons? Is this court bound by the face of that judgment, or can this court look beyond the face of that judgment and take into consideration the fact of non-service? Has this court that power? Can this court, sitting as a court of chancery, do that?

The Supreme Court of California simply restricted itself to the face of the judgment, saying that it could not look beyond the face of the judgment, saying that the remedy was on the equity side of the court. In Lake v. Bonynge it says that the issues in this case are no broader than in the case of People v. Davis; they are identically the same and therefore we are bound by that judgment.

Now, where we come into this court by a bill in equity setting out all the facts where we do as the Supreme Court of the State of California tells us to do, and all that after the patent has been issued, can that case, which told us our remedy is in equity, be said to be *res adjudicata* as depriving us of any remedy. It seems to us too clear for argument. With all due respect to the learned

statement of the justice below I do not feel that any good purpose can be served by imposing any further argument upon your Honors on that question otherwise than merely stating what the question is before this court.

### Closing Argument.

Counsel in arguing that the case of People v. Davis relied on by the court below in holding plaintiff estopped by the validity of the judgment being *res adjudicata* stated that the decision as to the validity of the judgment was not confined to the narrow ground of validity on its face, as the language I read from People v. Davis so clearly indicates, and called your Honors' attention to the fact that the affidavit and the order for publication were before the court in that case and thus inferentially were considered by the court, and with the affidavit and the order for publication before them they used the language in which they declared the judgment was valid on its face. Counsel quoted this language:

“The case in which the judgment in question was rendered was one in which service by publication was authorized, and it must be conclusively presumed, upon the attack made upon it, that there was a sufficient affidavit and a sufficient order.”

But just before that language the court uses this language:

“Neither the affidavit for publication of summons nor the order for publication constituted any part of the judgment roll under the law then in force, *and cannot therefore be considered*, notwithstanding the fact that they have been placed in the bill of exceptions.”

They were in the bill of exceptions but they were not considered. This language read in connection

with the language quoted by counsel explains why they were not considered. The court did not have power to hear the matter and did not have power to determine any matter with reference to the validity of the judgment beyond that which appeared on its face.

Thus we see that in *People v. Davis* the judgment was limited to the narrow issue of what appeared on the face of the judgment roll, which on its face, following the usual form of judgments, recited service of process. The records of the clerk showing absolutely and positively that there was no service of process, these were not before the court, and although they were in the bill of exceptions they could not be considered by the court.

Then came *Lake v. Bonynge*. There are two points made there: one the question of the validity of the judgment of forfeiture, and the other the question of whether its validity is *res adjudicata*. They refused to consider the first, because, as they say the issue in this case as made up is no broader than in *People v. Davis*, and being no broader we cannot look beyond the face of the judgment, and that in spite of the fact that the evidence is there in the record. They said "as this is a collateral attack we cannot look beyond the face of the judgment".

And thus the issue in *Lake v. Bonynge* is narrowed down to the same issue as was made in *People v. Davis*.

Now, here we come into this court, setting out all the facts, and if this judgment was taken without service of summons cannot this court look back of it?

The Supreme Court of the State of California has announced time and again that this narrow rule on collateral attack is applicable only to domestic judgments, judgments in its own state. Judgments in the State of Colorado, for instance, may be collaterally attacked in the State of California in any form and the court will go through the entire record. Thus under the rule laid down by the Supreme Court of the State of California this limitation on the power of the court not to look beyond the face of the judgment on collateral attack simply applies to domestic judgments. And as this is not a domestic judgment, but is the judgment of a court of another jurisdiction, this court under those very rules has the power to look beyond the judgment and consider these matters.

Estate of Hancock, 156 Cal. 804.

So much for the question of *res adjudicata*. Here we have both the issues set out fully and completely; there they had a narrow issue which the court as a domestic court was powerless to review.

The proposition that People v. Davis is *res adjudicata* in this appeal was very succinctly dealt with and disposed of by the Supreme Court of the State of California in the case of Lake v. Superior Court, 45 Cal. Dec. 425-430, where the same conten-

tion was made and the decision by Justice Van Fleet herein was cited. Speaking of the contentions we urge here as to the narrow limitations of the decision in *People v. Davis* and of their absolute inapplicability as *res adjudicata*, the court in that case said:

“The propositions thus advanced are so plainly true that they require no discussion.”

As above noted, this ruling by the Supreme Court of the State of California was handed down subsequent to Justice Van Fleet's decision herein and with that decision before the court.

As to the question of laches, counsel has laid great stress on the fact that there was a period of eight years between the rendition of this judgment and the discovery of the existence of the same by Davis and Gilman. That is charged as laches. That question is considered in its fullness and with care in our brief. I will but very briefly refer to it at this time.

This was a statutory right. In Kansas the forfeiture was automatically worked. In this state an action had to be commenced, a summons had to be served on the defendant and a judgment had to be obtained, a decree had to be rendered, the forfeiture was a judicial forfeiture. Davis and Gilman had a right to rely upon that.

It is true the law says the interest should be paid annually. In charging them with laches though we must take into consideration the facts as they exist.

What was the custom and the practice about paying interest annually? The universal custom and practice is to let the interest run until a man applies for his patent; then he pays up his back interest and gets his patent. This particular law in the State of California has received more prominence from being ignored than from being enforced. It is true that at times they begin these actions. The Surveyor General in the year 1888 and in the year 1891 reports to the Governor as to this law which in form requires them to commence these actions of forfeiture if the interest is not paid. He sets out in his report, of which the court will take judicial cognizance as a public document of California—*Knight v. United Land Ass.*, 142 U. S. 169; 33 L. ed. 978—that he does not enforce it and that it is not well to enforce it for the reason that if the land is of any value the principal and the interest will be eventually paid and the state will get the money; if the land is of no value it comes back to the state. The Surveyor General's report says that in many instances the interest amounts to more than the principal when they come to pay it up. Now, for the interest to amount to more than the principal there must be a delinquency at 7 per cent for more than 14 years.

Thus it appears that they recognize a delinquency of 14 years; and it was sanctioned and favored by the Surveyor General of the State of California.

We quote from page 9 of the Report of the Surveyor General dated August 1, 1888, under the heading "Delinquent Interest on State Lands":

"Suits in foreclosure, instituted because of the non-payment of the annual interest due on State lands, are extremely expensive legal proceedings; and long experience has demonstrated that such suits invariably result in loss rather than benefit to the interest of the State. *If the lands are of value the delinquent interest is always paid, even though it often amounts to as much as the principal.* On the other hand, when the lands revert to the State they are found to be of no value whatsoever, and the State suffers the loss of the expense of the suit of foreclosure. *During the last eighteen years the Registers have sent out the delinquent lists only seven times, though required to do so annually.*"

This report is a public document provided for by the law of the State of California (Pol. Code, Sec. 483).

Furthermore, as to the precise question of laches, after this judgment there was a period of eight years that had elapsed before this judgment was discovered. In the case of Hyde v. Redding, which counsel cited, there was this very question of delay. There was a judgment in a land contest in that case. In that case the attack on the judgment was not made until 11 years after the judgment of forfeiture was entered. The Supreme Court says:

"Was the plaintiff guilty of such laches as deprived him of the right to seek equitable relief? He waited 11 years after the judgments

in People v. Greene, but only 9 months elapsed after the certificate of purchase issued to Wolf and Lee. The Wolf and Lee certificates would not have constituted a cloud as against the prior certificate issued to Green; the patent to Wolf and Lee did not issue until after the commencement of this action. As we shall see, the judgments in People v. Green are void on their face, and therefore constitute no cloud. Even then, if the action be treated simply as one to remove a cloud, there was no laches such as deprived the plaintiff of his right to sue."

Mr. HUNSAKER. It will be noticed there, Mr. Boynton, that the action was commenced within nine months after the issuance of the second certificate.

Mr. BOYNTON. Yes. We commenced the proceeding in People v. Davis, we took action within —well; it may have been a few months in excess of nine months. The Bonyng certificate of purchase was issued sometime in 1899—

Mr. HUNSAKER. In January, 1900.

Mr. BOYNTON. Yes, in January, 1900.

Mr. HUNSAKER. And this action was commenced in 1911?

Mr. BOYNTON. In October, 1900, the motion was made to vacate the judgment in People v. Davis on the ground that there had been no service of process.

Counsel said we had the same remedy as they had in Hyde v. Redding. We thought we had. Hyde v. Redding was the authority on which we made the

motion in People v. Davis, but the Supreme Court distinguished Hyde v. Redding upon the theory that it appeared in that case that the defect was one of which the court took judicial cognizance, and they refused to take judicial cognizance of the defects in this action. That was the sole and the only difference.

And in October, 1900, we came in and made the motion. It appears by the complaint that all the back interest and principal were tendered to the State of California at that time. At the time of this tender and demand the state was the party in interest and the only one affected by any laches. Taking it from the point of view of the state at that time, the state from Davis got the principal and got interest for eight years; from Bonynge the state simply got the principal and interest from January, 1900.

And up to that time the state was the sole party in interest. Was the state to deprive itself of several hundred dollars of interest by alleging laches against these parties? Laches cause injury. Here was the case of the state being the party in interest and the state was benefited by taking and by preferring the earlier application.

We stated the facts of the invalidity of the judgment in Moran v. Bonynge—

Mr. HUNSAKER. I beg your pardon, the judgment is not mentioned.

Mr. BOYNTON. No, the judgment is not but it is alleged that the court did not have any jurisdiction to render the judgment.

Mr. HUNSAKER. You simply allege that your certificate is valid and outstanding and never has been foreclosed. The judgment is not mentioned.

Mr. BOYNTON. Well, the pleading will speak for itself. The complaint in Moran v. Bonynge is set out in the transcript (pp. 77-8).

Counsel has spoken of various remedies, such as mandamus. Considering how the Supreme Court of California in People v. Davis and Lake v. Bonynge narrowed the issues strictly to collateral attack, supposing we commenced a mandamus against the Surveyor General, could there be conceived a more clear case of collateral attack on the judgment? If they would not consider it here, wherein the judgment was pleaded, and where it is alleged by the defendant that the judgment was duly and legally rendered, if the court in that case had no jurisdiction to look behind the judgment, is it to be for an instant urged or entertained that the court could in an action between an officer of the state in the form of mandamus look behind that judgment and have gone into the equities back of the judgment which the court said had the appearance of being valid on its face?

And in the same way in an action to quiet title while the fee still remained in the state. There was no way of directly attacking that judgment

prior to the issuance of the patent. When the purchaser from the state is sued with the fee still remaining in the state, if that would not be a collateral attack within the lines laid down in Lake v. Bonynge, we submit one cannot suggest an example of such.

And this case of Hyde v. Redding shows that the judgment was one where the defect appeared on the face of the judgment. Counsel has cited some authorities to the effect that the state could have been sued. I have not had an opportunity to examine those authorities. I assume counsel will give me a copy of those citations. There may be something in those authorities I would want to answer. They were not in the brief. He does not seem to raise the point that we could have sued the state, that we had any power of bringing an action against the state to have the judgment set aside. The authorities, as I followed them, seemed to hold that the other suits could be maintained because they were not against the state. Under the rules laid down we could not reach this judgment except by a direct attack to which, as long as the title remained in the state, the state was a necessary party.

Now, as to the judgment, counsel has laid great stress on the fact that he contends People v. Mulcahy is not a direct attack. That case was a judgment that was set aside I think either 10 or 11 years after its rendition. The question there of laches was not entertained. In People v. Mulcahy, the

judgment was rendered after the passage of the Act of 1895. The Act of 1895 made the affidavit and the order for publication a part of the judgment roll. Thus the affidavit and the order for publication were before the court on the motion by virtue of that fact; and if the Act of 1895 had been passed three years earlier our case would have fallen within it and this judgment would have been void on its face. That is the substance of it. The jurisdictional requirements were not increased by this act; the statute which provides what must be done to acquire jurisdiction was in no manner altered,—the change was merely as to what evidence should appear in the judgment roll. Thus the fundamental question of jurisdiction was not affected. It was merely a method of proof, how to get the affidavits and the order for publication before the court for consideration. After the amendment the affidavit and the order for publication were before the court for consideration as a part of the judgment roll on a collateral attack. Before the amendment the affidavit and the order for publication were not before the court for consideration in the form of collateral attack but had to be brought before the court in an action on the equity side of the court. Once before the court then People v. Mulcahy says what effect such evidence legally before the court have. It says, with the evidence there, then the judgment is void. There is no escaping that. One of the very defects we point out

occurs exactly in People v. Mulcahy as in our case. In fact, it appears that the affidavit of publication might have been taken off the same form; the complaint was not verified; the affidavit did not state a cause of action. It used the same language as our affidavit. There is no distinction. In addition in People v. Davis there are two other defects, a total failure to say they made any search for Davis. It says the sheriff made a search in Kern County, whereas the statute requires that the search be made throughout the State of California. The law requires facts showing the search, not a mere conclusion. The affidavit says, affiant has made a diligent search; no fact as to what the diligence consisted of or what constituted the diligence, or what constituted the search. Nothing like that is alleged in the affidavit. It merely states his conclusion. The defendant did not live in Kern County, he lived in Sacramento County. His address was on his application. That is all they did. In drawing the complaint, they had the address of the defendant in their possession; they simply ignored the law, ignored all sense of justice, they simply looked around there in Kern County, if at all, and merely perfunctorily went through this form and deprived him of his property. As soon as he discovered this he tendered his back interest and the principal in full. The litigation has been going on all the time. There have been at least two actions pending constantly. These people who came into possession of

No. 2277.

IN THE

United States

# Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

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Judd E. Carpenter,

*Appellant,*

*vs.*

M. J. & M. & M. Consolidated, a corporation, Ethel D. Company, a corporation, Maricopa 36 Oil Company, a corporation, Wellman Oil Company, a corporation, Cliff Oil Company, a corporation, M. & T. Oil Company, a corporation, Associated Transportation Company, a corporation, Standard Oil Company, a corporation, Associated Oil Company, a corporation, Emilia E. Graham, as Executrix of the Estate of F. M. Graham, deceased, R. E. Graham, George E. Whitaker, William F. Phillips, Mary A. Bonynge, W. A. Bonynge, W. C. Price, John Doe, Richard Roe, Samuel Coe, Harry Green, John Brown, Richard Brown, Samuel Gray, Richard Gray and Harry Black,

*Appellees.*

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Oral Argument of Wm. J. Hunsaker on Behalf of  
Appellees.

Mr. Hunsaker: May it please Your Honors: A bare recital of the facts in chronological order will

suffice to show that the pretensions of the appellant are without equity.

In August, 1888, one S. Davis, who was a resident of Sacramento, and so stated in his application to purchase this particular section 36 of school land, in the county of Kern, made his application to purchase. Early in 1889—not in 1900, as inadvertently stated by Mr. Boynton,—Davis having paid to the state of California 20 per cent of the purchase price and one year's interest in advance on the balance of the purchase price (his application having been approved by the surveyor general), there was issued to him a certificate of purchase for the land. The only payment that was ever made to the state for the land was this 20 per cent of the purchase price and one year's interest in advance. The statute requires the interest on the balance of the purchase price to be paid annually in advance. On or about April 1, 1900,—a little over one year after the certificate of purchase was issued to Davis,—Davis assigned the certificate to Gilman, the predecessor in interest of the plaintiff here. Three years' interest being delinquent, the people of the state of California, August 25, 1892, commenced an action in the superior court of Kern county to foreclose and annul that certificate. The defendant in that action was Davis alone. By virtue of section 3552 of the Political Code of California, which is quoted in the brief of appellees, the only party necessary to that action was the holder of the certificate, unless the assignee had filed notice of the assignment in the office of the surveyor general or register of the state land office, and it is not claimed

that any such notice had been filed. Very soon after the commencement of the action, in August, 1892, summons was issued. The summons was placed in the hands of the sheriff of Kern county who, a few days afterwards, made return that, after diligent search, he could not find the defendant within that county. An affidavit for publication of summons was made by the district attorney and an order for publication was made, and, pursuant to the order, the summons was published for ten weeks in a weekly paper published in Kern county. December 27, 1892, the judgment, which it is claimed is here attacked—and I will notice that question later—was entered; and January 4, 1893, a certified copy of the judgment was filed in the office of the register of the state land office, and a certified copy in the office of the county recorder of Kern county January 16, 1893, as required by the statute. Nothing more is heard of the title to this land or the right of anyone to purchase it until in July, 1899, at which time Mary A. Bonynge, one of the appellees, made her application to purchase it. The officers of the state land office, *treating the judgment of foreclosure as valid*, received Mrs. Bonynge's application, accepted from her the 20 per cent of the purchase price and one year's interest in advance, and in January, 1900, issued to her a certificate of purchase.

During all these years neither Gilman nor Davis had paid a single installment of the interest due annually in advance to the state; they had paid no attention to the property; apparently had abandoned all claim to it. Then it appears from the allegations of the bill and

exhibits attached to it, that about October 1, 1900,—*more than seven years after the entry of judgment*—and eight or nine months after the certificate of purchase had been issued to Mrs. Bonynge—one Fred W. Lake, whose name figures in all of this litigation, and who apparently appears to have had no connection whatever with the claims of either Gilman or Lake, discovered the defects which it is claimed exist in the proceedings for the publication of summons in People v. Davis. That Your Honors may see just how that discovery was made, I will read very briefly from the affidavit first of Lake, which is attached to the bill; this will show how he made the discovery:

“That the first information relating to said delinquency, or to this action, or to the default or pretended judgment rendered therein was communicated “to them [Davis and Gilman] by this affiant that he “had, by mere accident, and within six months last past, “for the first time, discovered that said action had been “instituted and said pretended judgment entered, and “that no summons or complaint in said action was ever “or at all in any manner served upon said defendant in “said action.”

Gilman in his affidavit, page 61 of the printed transcript, says:

“The first information relating to said delinquency “or this action or to the default and pretended judgment rendered therein was communicated to this “affiant within three months last past by one Fred W. “Lake.”

Of course,—and I will cite an authority from the

8th circuit court of appeals directly in point on this proposition—Gilman and Davis, the holders of this certificate, were charged with knowledge of the law requiring the holder of the certificate to pay the money due each year,—charged with knowledge of the law that made it the duty of the officers of the state to publish a delinquent list, and, upon the failure to make payments, to commence an action for foreclosure of the certificate. All of these matters remained of record in the county clerk's office and the county recorder's office of Kern county, and in the surveyor general's office and the register's office of state lands.

After Lake had made his discovery in October, 1910, it appears from the allegations of the bill that December 7, following, Gilman conveyed a one-half interest in this certificate (which had been foreclosed and annulled more than seven years before) to Lake and a one-quarter interest to one Snow,—Gilman retaining a one-quarter interest.

I want to be perfectly frank with the court. Mr. Boynton has said that there was a cotemporaneous agreement between Lake and Snow on the one part and Gilman on the other that Lake and Snow were to institute legal proceedings to enforce the rights of the holders of the Davis certificate. Now, it is a fact that there was such a contract made, and it was so found by the superior court of Kern county in the case of Lake and Snow v. Bonynge, to which reference has been made by Mr. Boynton; but it is likewise true that, in framing this bill, where it was incumbent upon this plaintiff, if it ever was incumbent upon a plaintiff in a

court of equity, to show good faith and how he comes into this litigation—I say in framing this bill this contract of the 7th of December, 1900, to which Mr. Boynton has referred, is not before this court and it—

Mr. Boynton: Pardon me for interrupting you, but it is in the judgment in Lake v. Bonynge.

Mr. Hunsaker: I want the benefit of that agreement, to have it before this court, because it puts the predecessor in interest of the plaintiff here—Gilman—in privity, by contract, with Lake and Snow in all this litigation. But the trouble is, that the gentleman, for the purpose of framing a bill here which it was supposed would get past a demurrer, did not set forth the findings in Lake v. Bonynge. But that contract is set forth in the opinion of the supreme court in Lake and Snow v. Bonynge, 161 Cal. 120.

The conveyance was made to Snow and to Lake on the 7th of December, 1900. A few days after that, December 14, 1900, Lake gave notice of a motion to vacate and set aside the judgment of foreclosure; that motion was made on the ground that the judgment was void,—precisely on the same grounds that it is alleged here in this complaint,—that there was no service of summons. And December 31, 1900, the superior court of Kern county granted that motion. On the same day, December 31, 1900, Gilman, Lake and Snow filed a complaint in intervention in an action entitled Moran v. Bonynge, which involved the right to purchase this land upon a contest referred by the surveyor general between Mary A. Bonynge and Thomas L. Moran. In their complaint in intervention in that case Gilman,

Lake and Snow alleged that a certificate of purchase had been issued to Mary A. Bonynge in January, 1900, and that she claimed the land thereunder, but that the certificate had been improvidently issued to her and that the Davis certificate was valid and outstanding. So that, between October 1, 1900, and December 31 of that year, Gilman, Lake and Snow acquired and had actual knowledge of the existence of the very fact and the precise objection which the appellant claims in this bill now to have notice of. They had actual notice then. They had had constructive notice at all times since the rendition of the judgment of foreclosure of December 27, 1892.

In the case of *Moran v. Bonynge*, the supreme court of California held that the demurrers which had been sustained by the lower court to the amended complaint in intervention were properly sustained, because no facts were alleged in the complaint in intervention showing that Davis had the qualifications to enter the lands, or that the preceding steps which had been taken authorized the issuance of that certificate. That was the ground of the decision in that case.

December 11, 1901, about 11 months after the entry of the order of December 31, 1900, purporting to vacate and annul the decree foreclosing the Davis certificate, the superior court of Kern county, on the application of the district attorney, made an order setting aside the order purporting to vacate the judgment and expressly declaring that the judgment in *People v. Davis* was good and valid. From that order Lake took an appeal to the supreme court, which is reported in 143 Cal. 673, and to which Mr. Boynton has referred.

At this point it is proper to call Your Honors' attention to other portions of the opinion; and, in passing, to observe that Mr. Boynton is mistaken when he says that People v. Mulcahy, which is cited in his brief, is in point here in support of the proposition that the judgment in the case of People v. Davis was void. Prior to 1895 the affidavit of publication and the order for publication constituted, under the statute of California, no part of the judgment roll. In 1895 the statute was amended so as to make those two papers a part of the judgment roll. People v. Mulcahy, as is pointed out in appellee's brief (p. 14), arose after the proceedings in that case, after the amendments, and the affidavit and order, at the time the judgment was rendered, constituted a part of the judgment roll.

In People v. Davis the supreme court decided more than Mr. Boynton contends that it did. At page 677 the court said:

“Was the judgment void upon its face? This question, as we have already seen, must be determined from an inspection of the judgment roll. Under the statute as it was at the time of the entry of this judgment and for several years thereafter, the judgment roll in cases where the complaint was not answered by any defendant, consisted of the summons, with the affidavit and proof of service, and the complaint, with a memorandum indorsed thereon that the default of the defendant in not answering was entered, and a copy of the judgment. (Code Civ. Proc., sec. 670, subd. 1, as it stood prior to amendment of 1895.)

“Neither the affidavit for publication of summons

“nor the order for publication constituted any part of  
“the judgment roll under the law then in force, and  
“cannot therefore be considered, notwithstanding the  
“fact that they have been placed in the bill of excep-  
“tions. (People v. Temple, 103 Cal. 447, 453.) The  
“case in which the judgment in question was rendered  
“was one in which service by publication was author-  
“ized, and it must be conclusively presumed, upon the  
“attack made upon it, that there was a sufficient affi-  
“avit and a sufficient order. There is therefore noth-  
“ing in the point that the affidavit and order for pub-  
“lication were insufficient.”

And on page 678:

“These are the only points made in favor of the con-  
“tention that the judgment was void upon its face. The  
“lower court did not err in holding that the judgment  
“was upon its face a valid judgment, and that the order  
“purporting to vacate it, made after the lapse of eight  
“years, was a mere nullity and should be vacated.”

Now, Your Honors will see that on that appeal the facts were before the court as they are here. These papers appeared in the bill of exceptions; while here they are attached as exhibits to the bill.

Again, as to what was really decided in People v. Davis, the court first said—and I will not read the portions of the opinion which were read by Mr. Boynton, reading from 161 Cal., page 124:

“The answer of the defendants admitted the issuance  
“of the certificate of purchase to Davis, and among  
“other defenses, set up the judgment in the case of the  
“People v. Davis of December 27, 1892; foreclosing

“and annulling his certificate of purchase; the motion  
“and order of December 31, 1900, setting aside and  
“vacating said judgment; the proceedings and order  
“of November 11, 1901, vacating this latter order, and  
“the fact of an appeal therefrom to this court and the  
“judgment of affirmance here of the order of Novem-  
“ber 11, 1901, and averred that the said judgment of  
“December 28, 1892, was ‘duly given and made and  
“‘entered’ and was a valid, subsisting and final judg-  
“ment under which said certificate of purchase issued  
“to Davis was foreclosed and annulled and all his rights  
“thereunder terminated, and further, that the judgment  
“of this court on the appeal from the order of Novem-  
“ber 11, 1901, was *res adjudicata* as to the validity of  
“said original judgment.

“The court found in favor of the defendants as to the  
“validity and effect of these respective judgments and  
“entered a decree in their favor sustaining the validity  
“of the patent to the defendant Mary A. Bonynge.”

Then follows the statement that it was only necessary to determine the one question and that was as to whether the proceedings were *res adjudicata*.

Omitting the paragraph read by Mr. Boynton I continue:

“It is insisted by appellants that on the appeal from  
“the order of November 11, 1901 (to be referred to  
“hereafter as the Davis appeal), this court ‘merely  
“‘determined that Davis (or his successor in interest  
“‘Lake, one of the plaintiffs here) could not move to  
“‘set aside the judgment more than one year after its  
“‘entry unless the judgment was void on its face. It

“ ‘did not determine the question whether or not the  
“ ‘court had acquired jurisdiction of the person of  
“ ‘Davis.’ But in this assertion we are satisfied that  
“counsel is in error, and that the very question which  
“was determined, and which was the essential point  
“involved on the appeal was whether the original judg-  
“ment entered against Davis was or was not valid.  
“The appeal which was taken from the order of No-  
“vember 11, 1901, vacating the order of December 31,  
“1900, which had set aside the judgment against Davis,  
“may have involved incidentally the question whether  
“the order setting aside the original judgment was  
“invalid because application therefor had not been made  
“within a year after its entry (Code Civ. Proc., sec.  
“473), but it involved principally the question whether  
“the order could be supported on the ground asserted  
“by appellant on that appeal,—namely, that an inspec-  
“tion of the judgment roll showed on its face that the  
“judgment was invalid.”

There is further language to the same effect on page 127, but I will not take the time to read it.

So that, in a question involving the effect of a judgment of the superior court of Kern county in an action which concerned only and related solely to the disposal of the land of the state of California pursuant to its statutes, the supreme court of California has held that the judgment is a good and valid judgment not subject to collateral attack. Yet we are told by the appellant in his brief and by learned counsel in argument that the judgment was void. That has been the position of the appellant throughout this litigation.

The attack which is made here is purely and solely collateral. While it is stated in the brief of appellant that this is an action to set aside the judgment, and there is a prayer for that relief, counsel is in error. He evidently adopted a brief that was prepared in another case, for there is no such prayer here. The theory of this case is precisely the same as the theory adopted by the same counsel in the case of Lake and Snow v. Bonynge,—namely, that the judgment foreclosing the Davis certificate is absolutely void and that it can be attacked anywhere. The relief prayed for by the bill here is precisely the relief that was prayed for in Lake and Snow v. Bonynge except that here injunctive relief is asked and an accounting prayed for. The relief asked by this bill is not to vacate and set aside the decree of foreclosure. The prayer of the bill is that these defendants and appellees be declared trustees of the legal title to a one-sixth interest in this property,—which is alleged in the bill to be now worth one million dollars,—in trust for the complainant, and that the several defendants be directed to execute conveyances to the complainant.

Now, proceeding with the recital as to the facts: The case of Moran v. Bonynge was litigated, and it was determined that Mrs. Bonynge was entitled to purchase the land from the state. The judgment upon the appeal of Gilman, Lake and Snow was affirmed, and January 25, 1909, a patent was issued by the state of California to Mary A. Bonynge. As has been stated by Mr. Boynton, Lake and Snow, acting pursuant to this contract made December, 1900, with Gilman, and

under which Lake had made the motion to set aside the judgment in December of that year,—and acting pursuant to which Lake and Snow,—Gilman in the meantime having died,—commenced the action of Lake and Snow v. Bonynge, which, as I have stated, was to obtain the very same relief that is prayed for in this case. The lower court held that they were estopped, that the matter was *res adjudicata*. They took an appeal to the supreme court, with the result that the judgment was affirmed, and I have read from the opinion in that case to Your Honors.

All of these matters were of record. Gilman died shortly before the patent issued to Mrs. Bonynge.

It is alleged in this bill that certain of the heirs of Gilman, who it is alleged owned a one-sixth interest in this certificate, conveyed their interest to one Deal, and thereafter a decree of partial distribution was made in the matter of the estate of Gilman to Deal, and that on or about August 9, 1910, Deal, by an instrument in writing, sold, transferred, assigned and granted all his right, title and interest in and to the said section of land and the said certificate of purchase to complainant, Judd E. Carpenter. There is a like allegation preceding that with respect to the conveyance from certain of the heirs of Gilman to Deal. I am reading from page 19 of the record. Your Honors will note that there is no pretense, there is no allegation here that Deal did not have full and complete notice of all these proceedings, or that Carpenter, who comes into this court with this case on this one-sixth interest under the allegation that he is a citizen and resident of New

York, had no notice of all these prior proceedings. They were of record and, presumptively, he did have knowledge of them, and he sets them forth in his bill. But, more significant than that, if Your Honors please,—there is no allegation that Carpenter or Deal paid anything for the assignment of these interests. Deal and Carpenter, like Lake, are mere interlopers, who, believing that there existed a technical defect in the foreclosure proceedings,—not that the summons was not published, not that the judgment did not recite due service, not that the supreme court of California has not repeatedly declared that such judgments are valid and not subject to collateral attack,—but, forsooth, because Lake in 1900, mousing through the records discovered that there were defects in the affidavit for publication and that the complaint was not verified,—we have had all of this litigation. There is no good faith. There is no such reasonable diligence, no such conscientious effort, as can call into exertion the powers of a court of equity.

Now, on the question of laches, which is fully discussed in the briefs, I wish to read very briefly from the opinion of the circuit court of appeals for the eighth circuit, in the case of Burgess v. Hillman, 200 Fed. 929, which was decided after Judge Van Fleet ruled on the demurrer in this case, and which involves an analogous proposition arising under the laws of Kansas, with this difference, however: that the statutes of Kansas do not provide for a judicial foreclosure. The statutes of that state authorize certain officers, upon the default of a purchaser of its lands, to publish

certain notices and make certain entries in the public records, whereupon a forfeiture takes place. So that, instead of the court there having under consideration the question of the effect of a judgment of the superior court of the state the forfeiture was one arising under the statute without judicial action. That suit was brought seven years after the forfeiture accrued. In the time intervening the holder of the certificate, who was an assignee, as Gilman was, and as Lake and Snow and appellants are, brought a suit in the state court; he dismissed that suit after it had been pending there sometime and brought a suit in the federal court to be relieved from the forfeiture. In the meantime the legislature of Kansas had passed an act limiting the bringing of actions for relief against forfeitures to six months with respect to forfeitures thereafter accruing. In California the limitation in an action to set aside a judgment on the ground of fraud or mistake is three years after the discovery of the fraud. (C. C. P., sec. 338, subd. 4.) Under section 343 of the Code of Civil Procedure, which in substance provides that relief not covered by any of the preceding sections, must be commenced within three years. Now, bearing in mind, of course, that the rule is that these parties were charged with notice of what appeared on the records, and, moreover, that everybody had actual notice 11 years before this bill was filed, this case is particularly in point. And it answers the proposition too, quoting from an opinion of the supreme court of Kansas, that the holders of these certificates did not know there was a delinquency; that they did not know that proceedings had

been, or would be, taken to foreclose the Davis certificate. After quoting from an earlier opinion of the same court, the court of appeals for the eighth circuit, in Burgess v. Hillman, 200 Federal 931, uses this language:

“The above rule was restated and enforced in the “other cases cited. The case of Burgess v. Hixon, 75 “Kan. 201, 88 Pac. 1076, was a case wherein this same “appellant was seeking to eject Hixon from certain “school land which had been purchased from the state “by one Walton in the same manner as the lands in “controversy herein had been purchased by Adair. “Burgess was the assignee of Walton. The language “of the court in the case cited is very appropriate as “characterizing the position of Burgess in the present “case, and we repeat it here, as follows:

“‘Of course Walton knew from the instant of his “first default that his rights were subject to forfeiture. “He knew that upon his failure to pay it was the im- “perative duty of the county clerk to put into opera- “tion, and of the sheriff to carry out, forfeiture pro- “ceedings. He was bound to anticipate and to expect “that the law would be followed, and the record which “was in fact made was ample to give him information “that the state had undertaken to terminate his rights, “and that the officials having authority in the matter “construed what was done to amount to a restoration “of the land to the public domain.’

“It sufficiently appears from the record that the lands “in question were of a speculative value, and appellant “does not seem to have had sufficient interest in the

"same for three years to pay any of the installments of  
"interest, or to ascertain from the many sources of  
"information open to him the condition of the title.  
"After having had actual notice of the forfeiture, he  
"delayed more than a year before commencing his ac-  
"tion in the state court, and then, after that action had  
"been pending for two years, he dismissed it and com-  
"menced the present action. In the meantime appellees  
"had gone into possession of the land and made lasting  
"and valuable improvements. It is true appellant in his  
"bill offers to allow appellees to receive credit by de-  
"ducting the value of the improvements from the rents  
"and profits claimed by appellant, but we do not think  
"appellees in equity owe appellant any rents and profits.

"Therefore the decree of the circuit court must be  
"affirmed; and it is so ordered."

It is claimed in answer to the contention that the complainant is barred by laches that the predecessors in interest of the appellant were constantly waging some sort of a contest against the validity of the Bonynge certificate. But first let it be remembered that before they undertook to wage any such contest Gilman, the predecessor in interest of the appellant and assignee of Davis,—the original holder of the certificate,—had stood by for ten years and had not paid a cent of interest, had apparently abandoned all claim under this certificate. Moreover, that while they were ineffectually pursuing these improper remedies there were several remedies, and abundant remedies, open to the holders of the Davis certificate prior to the issuance of the patent to Mary A. Bonynge. In the first place,

section 3414 of the Political Code of California provides that in any case where a question arises before the surveyor general or register of the state land office as to the validity of a certificate of purchase, the contest may upon the demand of either party be referred to the superior court of the county in which the land is situated for determination and that the judgment shall be binding upon the parties. But it is said by learned counsel in their brief that in the case of Youle v. Thomas, 146 Cal. 537, the supreme court held that the power of the surveyor general or register to make a reference was exhausted by one reference, and that, as the contest between Mary A. Bonynge and Thomas L. Moran had been referred to the superior court, that the holders of the Davis certificate were precluded from availing themselves of that remedy. But an examination of the opinion in that case will show, as appellees have pointed out in their brief (p. 66), that the court did not so hold. The court held that where a contest between two applicants had been referred, the surveyor general was without authority to receive subsequent *applications* while that contest was pending. There is no intimation that the holder of a prior certificate could not institute a contest; or, to state the case concretely, that after the issuance of the certificate to Mary A. Bonynge, the holders of the Davis certificate could not have instituted a contest against her. There is nothing in that case which in anywise contravenes that view.

In Moran v. Bonynge [157 Cal. 295], to which Gilman was a party by intervention, the supreme court did not hold that Gilman, Lake and Snow had no right

to intervene, but that their complaint in intervention did not state facts sufficient to warrant them in intervening.

Again, at any time after the issuance of the certificate to Mrs. Bonynge, the holder of the Davis certificate could have maintained an action under section 738 of the Code of Civil Procedure of California, which authorizes actions to determine conflicting claims to real property, and could have had the title determined. The statutes of the state, as is pointed out in appellees' brief, makes the certificate *prima facie* evidence of title. In Hyde v. Redding, 74 Cal. 493, one of the cases cited in the brief of the appellant, that is what was done; precisely the same situation was presented there as is presented by the record in this case. In that case the plaintiff claimed under a prior certificate or certificates, which had been foreclosed by a judgment which was void upon its face. New certificates were issued. The holders of the original certificates brought an action, based on their certificates, against the holders of the junior certificates and successfully maintained the action.

They had the remedy of mandamus. There are other remedies which are pointed out in our briefs.

As it has been argued here that the state could not be sued I wish to call Your Honors' attention to some authorities outside of those cited in the briefs. Of course, the state was a party to the action in People v. Davis. The court rendering it had full power and authority, if the judgment was void upon its face, to set it aside at any time. This is all pointed out in

appellees' brief. The state, having been a party to the original action, these remedies clearly were open to appellant. In People v. Temple, 103 Cal. 447, it was held that what constituted a reasonable time within which such a motion could be made upon extrinsic evidence must depend somewhat upon the circumstances of each case. But that a motion made twelve years after the judgment was entered was not made within a reasonable time. It was held, in People v. Davis, 143 Cal. 673, that a motion made within eight years was not made within a reasonable time.

In State v. Nicholls, 42 La. Ann. 209, it was held that a mandamus proceeding against the register of the state land office to coerce the performance of duties purely ministerial is not a suit against the state. The court used language which is directly in point, but I will not take the time to read it at this time, but I will ask to be allowed to hand it to the reporter, and have it inserted in my argument:

"Recurring to the answer of the respondents, we observe that seeming stress is laid by the attorney general upon the alleged want of authority on the part of the governor, as well as of the register of the state land office, to stand in judgment for the state. This we consider a misconception of the issues involved in this case. In no proper sense is the state a party to this suit, and no judgment or relief is asked for against her; for, if such were the case, this proceeding would have to go out of court immediately, for it is a familiar principle 'that the sovereign cannot be sued 'in his own courts, without his consent' (State v.

“Burke, 34 La. Ann. 548; State v. Lazarus, 40 La. “Ann. 858, 5 South Rep. 289; Louisiana v. Jumel, 107 “U. S. 728, 2 Sup. Ct. Rep. 128), and no such consent “is averred in this case. In our conception, this is a “suit or proceeding, by way of the extraordinary rem- “edy of mandamus, taken on the part of a private citi- “zen against the chief executive officer of the state “government, and against one of the subordinate offi- “cers of that department, for the purpose of obtaining “specific relief by coercing them to carry out and com- “plete a contract in the ordinary form which he had “entered into with the predecessor of the respondent “governor, upon the completion and fulfillment of “which, said citizen, as relator, has large and valuable “interests depending, and in the performance of which “a specific duty is imposed upon the governor by a spe- “cial act of the legislature, and wherein he was wholly “without discretion.”

In Watts v. Wheeler, 10 Texas Civil Appeals 117, 30 S. W. 297, it was held that neither the state nor the commissioner of the general land office was a necessary party to a suit to try the title to grazing lands between a lessee of such lands from the state and a settler claiming as a purchaser from the state. The court said:

“It is not necessary that either the state or com- “missioner of the general land office should have been “made a party to this suit; the contest was between “appellant and appellee as to which one had the better “title under the state.”

I wish also to cite in this same connection *Tindal v. Wesley*, 167 U. S. 204, at page 221, and to call your attention to this language:

"The adjudged cases, in principle, determine the one before us. The settled doctrine of this court wholly precludes the idea that a suit against individuals to recover possession of real property is a suit against 'the state simply because the defendant holding possession happens to be an officer of the state and asserts that he is lawfully in possession on its behalf. We may repeat here what was said by Chief Justice Marshall, delivering the unanimous judgment of this court in *United States v. Peters*, 5 Cranch. 115, 139: 'It certainly can never be alleged that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.' Whether the one or the other party is entitled in law to possession is a judicial, not an executive or legislative, question. It does not cease to be a judicial question because the defendant claims that the right of possession is in the government of which he is an officer or agent. The case here is not one in which judgment is asked against the defendants as officers of the state, nor one in which the plaintiff seeks to compel the specific performance by the state of any contract alleged to have been made by it, nor to enforce the discharge by the defendants of any specific duty enjoined by the state."

Also *Davis v. Gray*, 16 Wall. 203.

I think Your Honors will recall *Pennoyer v. McConaughy*, 140 U. S. 1, in which it was decided that a citizen of one state may maintain a suit against the land commissioners of another state to restrain them from reselling swamp lands claimed by the complainant, on the ground that the statute under which they intended to act is invalid, as impairing his contract of purchase from the state under a prior act, and that such a suit was not one against the state.

So that, if this judgment had been voidable, if seasonably attacked by a direct suit in equity, the only parties in interest after the issuance of the certificate to Mary A. Bonyngé being her and the holders of the Davis certificate,—the state holding merely the legal title to be conveyed to whoever should finally be awarded the right to purchase,—there was an ample remedy by a suit against the register of the state land office to enjoin him from recognizing the validity of the certificate which had been issued to Mrs. Bonyngé, and in which action all relief to which the holder of the certificate was entitled, if entitled to any, could have been granted. The existence of these several remedies are elaborated in the brief of appellees.

I wish merely in conclusion to observe that neither fraud nor mistake are charged here. All that is claimed is that the district attorney failed to prepare the affidavit which sufficiently sets forth the acts constituting diligence in the search for Davis; and that the cause of action was not stated in the affidavit as required by the state statute, and that the complaint was not verified. There was no absence of service; there were

merely defective proceedings leading up to the order for the publication of the summons. And the supreme court of California, following a long line of decisions, held, in *People v. Davis* [143 Cal. 672], and in *Lake and Snow v. Bonynge* [161 Cal. 120], that the judgment was not void.

I will not take the time of the court to discuss the question of *res adjudicata*. It is fully covered in appellees' brief.

We submit that the bill is without equity and that the demurrer was properly sustained on both grounds stated in the memorandum opinion of Judge Van Fleet.

There is an error on page 7 of the brief which I desire, with the permission of Your Honors, to correct. It is as to the date of the judgment of the supreme court in *Moran and Snow v. Bonynge*; that date is stated as February 7, 1900, when it should have been 1910.

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[Counsel for appellant has inserted as a part of his oral argument an extract from the report of the surveyor general of California of August 1, 1888, which was not read on the oral argument. Leave is asked by appellees—for the purpose of exposing the fallacy of the views of the surveyor general embodied in such quotation—to here print the following sections of the Political Code of California, prescribing the duty of the officers charged with the preparation of publication of the list of delinquent purchasers, the commencement and prosecution of actions for the foreclosure and cancellation of the certificates of purchase:]

"The register must, on the first day of May, of each year, forward to the district attorney of each county a statement embracing all the lands in the county upon which payments have not been made, which statement must show the name of the purchaser, the postoffice address of the purchaser, the number and date of the survey or location and of the certificate of purchase, "the amount paid, the amount unpaid, and the amount "then due." \* \* \*

Political Code, sec. 3546.

"Upon receipt of the delinquent list the district attorney must add thereto a notice that if the amount due "is not paid in fifty days after the date thereof he will "commence suit to foreclose the interest of purchasers "in the lands and must publish the list and notice for "four weeks immediately following the date of the "notice in a newspaper published in the county, or if "there is no newspaper published therein, then he must "post copies of the same in at least five public places in "the county."

Political Code, sec. 3547.

"After the expiration of the fifty days, he must, "in the name of the people of the state of California, "commence actions in the superior court against all "purchasers, or holders of certificates of purchase, who "have not either paid the amount due, together with the "cost of publication, or surrendered the title to the "state, as provided in section three thousand five hundred "and seventy, to obtain a judgment of foreclosure "of the interest of the purchaser, or assignee of the

“purchaser in the land, and to annul the certificate of  
“purchase.”

Political Code, sec. 3548.

“Service of the summons in such action may be made  
“by publication in some newspaper published in the  
“county for four weeks, or if no newspaper is published  
“in the county, then by posting one copy of the sum-  
“mons for four weeks at the court-house door of the  
“county, and two copies in public places in the township  
“where the land is situated.”

Political Code, sec. 3549.

“Twenty days after the entry of judgment the dis-  
“trict attorney must file in the office of the register,  
“and in the recorder’s office of the county in which the  
“land is situated, certified copies thereof.”

Political Code, sec. 3550.

“The holder of the certificate of purchase may, at  
“any time before such filing, pay to the sheriff the  
“amount due the state and the costs of suit that have  
“accrued up to the time of payment; whereupon the dis-  
“trict attorney must dismiss the suit or vacate the judg-  
“ment and the purchaser or holder of the certificate of  
“purchase is restored to his rights in the premises.”

Political Code, sec. 3551.

“A judgment against the purchaser binds the as-  
“signee, unless the notice of the assignment was filed  
“with the register before the commencement of the  
“action.”

Political Code, sec. 3552.

“After judgment foreclosing the interest of the pur-chaser or the holder of the certificate has been en-tered and the certified copies filed, the land is again “subject to entry and sale.”

Political Code, sec. 3554.

“Any person having a conveyance of the whole or “any portion of the lands described in any certificate “of purchase, to annul which suit has been commenced, “but to whom the certificate has never been sur-“rendered, may defend such action; and if it appears “to the court that he is entitled to any portion of the “land described, and the holder of such certificate does “not pay the amount due, the court must order the cer-tificate annulled and a new one to issue to such person “upon payment into court by him of the amount due “the state upon the whole tract; and such person is “thereupon entitled to two certified copies of the de-cree, one of which he must file in the county recorder’s “office and the other with the register.”

Political Code, sec. 3556.



No. 2277

IN THE

**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

JUDD E. CARPENTER,

*Appellant,*

vs.

M. J. & M. & M. CONSOLIDATED (a corporation),  
ETHEL D. COMPANY (a corporation), MARI-  
COPA 36 OIL COMPANY (a corporation),  
WELLMAN OIL COMPANY (a corporation),  
CLIFF OIL COMPANY (a corporation), M. &  
T. OIL COMPANY (a corporation), ASSOCIATED  
TRANSPORTATION COMPANY (a corporation),  
STANDARD OIL COMPANY (a corporation),  
ASSOCIATED OIL COMPANY (a corporation),  
EMILIA E. GRAHAM, as executrix of the estate  
of F. M. GRAHAM, deceased, R. E. GRAHAM,  
GEORGE E. WHITAKER, WILLIAM F. PHILLIPS,  
MARY A. BONYNGE, W. A. BONYNGE, W. C.  
PRICE, JOHN DOE, RICHARD ROE, SAMUEL COE,  
HARRY GREEN, JOHN BROWN, RICHARD  
BROWN, SAMUEL GRAY, RICHARD GRAY and  
HARRY BLACK,

*Appellees.*

**APPELLANT'S PETITION FOR A REHEARING.**

*To the Honorable William B. Gilbert, Presiding  
Judge, and the Associate Judges of the United  
States Circuit Court of Appeals for the Ninth  
Circuit:*

Appellant presents this his petition for a re-hear-

ing herein and moves the above entitled court for an order setting aside and vacating its decision and judgment affirming the judgment and decree of the District Court.

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### **1. Invalidity of the Judgment in *People v. Davis* Should Be Considered Even Though the Attack Is Collateral.**

The decision of this court takes the judgment of foreclosure in *People v. Davis* (143 Cal. 672) at its face value, and refuses to consider the allegations of the bill disclosing the invalidity of the judgment, because, says the opinion, the bill makes only a collateral and not a direct attack upon that judgment.

That the facts alleged in the bill show a lack of legal or sufficient service upon defendant in that case to give the Superior Court jurisdiction of his person, is not and cannot be disputed (*People v. Mulcahy*, 159 Cal. 34; Sec. 21 of our brief).

Such being the case, it certainly can make no difference, we think, whether the attack made on that judgment by the bill in this suit is direct or collateral. The form of the attack in this case is, it seems to us, utterly immaterial. The jurisdictional recitals of a judgment of a state court can always be disputed and the validity of such judgment, notwithstanding such recitals, can always be determined in the federal court, no matter in what form the question may arise. This rule was first announced by the Supreme Court of the United

States in *Thompson v. Whitman*, 18 Wall. 457, 459, in the following definite and unequivocal language:

“On the whole, we think it clear, that the jurisdiction of the court by which a judgment is rendered in any State, may be questioned in a collateral proceeding in another State, notwithstanding the provisions of the fourth article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself.”

The judgment in that case was fair on its face and the attack was wholly collateral. The rule was again announced in *Knowles v. Gaslight etc. Co.*, 19 Wall. 58, where it was held that oral testimony could be introduced to contradict the recitals of such a judgment. In other words, it is held by the United States Supreme Court that when it is sought to use the judgment of a state court in the federal court or the courts of another state for any purpose, the question of jurisdiction of the court rendering the judgment is always an open one. These cases have been consistently followed by both the state and federal courts and are everywhere accepted as unquestioned authority.

On this point let us again call the attention of the court to *Cooper v. Newell*, 173 U. S. 555, as a case exactly in point here. In that case nothing but a collateral attack was made on the judgment of the state court which was fair on its face.

There an action of trespass to try a title was instituted on the law side of the federal court and a plea of former judgment was entered. Notwithstanding the former *prima facie* prior adjudication

by the state court, the court received evidence showing the judgment to be invalid and disregarded such judgment, citing, among other cases, *Galpin v. Page*, as its authority for doing so (see brief sec. 20).

*Galpin v. Page*, 18 Wall. 350, is also absolutely conclusive on this point. There a judgment of this state was urged in bar of certain property rights in an action in the United States Circuit Court here. But the judgment of the California court, although valid on its face, was shown by extrinsic evidence to be void; and this an action brought primarily to recover real property; an attack much less direct than the one here made.

Mr. Justice Field wrote the opinion in that case and on its return to the Circuit Court here rendered the final decree therein. His able opinion rendered in the Circuit Court is reported in *Galpin v. Page*, Fed. Cas. No. 5206.

Our state Supreme Court recognized the law as here stated in the case of *Estate of Hancock*, 156 Cal. 804. That case was an appeal in a proceeding instituted under our Code of Civil Procedure to determine the "heirship of deceased" and a Colorado decree of divorce was incidentally or collaterally involved. The divorce decree was also fair on its face. Our Supreme Court, however, decided that it could be collaterally impeached, saying:

"The county court of Bent County, Colorado, was, under the express terms of the constitution of Colorado, a court of record, and any judgment given by it is entitled to the benefit of the presumption that it was authorized by law

(see 2 Freeman on Judgments, sec. 565), provided, however, it may be assumed, the jurisdiction of the court in matters of divorce is shown (1 Nelson on Marriage and Divorce, sec. 19). A judgment of a court of record of another state differs in its conclusive effect from a judgment of a court of record of this state in one material respect, viz.: that it is always open to the person against whom the judgment is attempted to be used to show by evidence other than the record of the judgment, and even by evidence opposed to recitals contained in such record, that the court purporting to give the judgment was without jurisdiction either of the cause or of the parties. If such lack of jurisdiction in one or the other of these respects is not made to appear, the judgment is as final and conclusive on collateral attack as would be a judgment of one of our own superior courts, but if such lack of jurisdiction is made to appear, the judgment must be regarded as a nullity (see 2 Freeman on Judgments, sec. 563; *Thompson v. Whitman*, 18 Wall. 457; *In re James*, 99 Cal. 377 [37 Am. St. Rep. 60, 33 Pac. 1122]; *Greenzweig v. Strelinger*, 103 Cal. 278 [37 Pac. 398]; Code Civ. Proc., sec. 1916). It was said in the James case cited above: ‘We agree with appellant that it is competent to collaterally impeach the record of a judgment rendered in another state by extrinsic evidence showing that the facts necessary to give the court pronouncing it jurisdiction to proceed, did not exist; and this is true although the record sought to be impeached may recite the existence of such jurisdictional facts.’ ”

This principle holds true although the judgment involved is a judgment of a state court wherein the federal court is sitting (*Cooper v. Newell*, 173 U. S.

555; *Cooper v. Brazelton*, 135 Fed. [C. C. A.] 476; *Galpin v. Page*, Fed. Cas. No. 5206).

Upon what authority then, or upon what principle is appellant prevented from asserting his rights in the certificate of purchase set forth in the complaint until the judgment in *People v. Davis* shall have been set aside and vacated, especially when he has set forth not merely general allegations denying the validity of the judgment in *People v. Davis*, but has pleaded the documentary evidence which shows conclusively that, however fair on its face it is an absolute nullity for want of jurisdiction of defendant?

Under the authorities just cited, it is, we think, the duty of the court to disregard the judgment in *People v. Davis* and adjudicate our rights as though it had never been rendered, because without jurisdiction of the person it was and always has been only so much waste paper, and when presented to this court as it is in appellant's bill, the court could and should take cognizance of its jurisdictional defects.

In the state courts the defects of a domestic judgment can, of course, be considered only upon a direct attack, when it is fair on its face, but in this court that judgment cannot be treated as a domestic judgment, and under the authorities cited, this court can consider such jurisdictional defects, regardless of the form or manner in which they may be presented.

## 2. Bill of Complaint Makes a Direct Attack.

Even if a direct attack were necessary, it is, we think, certainly made in this case. The bill sets out the facts showing the invalidity of the judgment in *People v. Davis*, and while it does not pray specifically for the cancellation of that judgment it does pray for general relief at the close of the second paragraph of the prayer, asking for such further relief as to equity may seem meet and proper. The bill, therefore, contains all the elements of a direct attack. Thus in *Bergin v. Haight*, 99 Cal. 52, an action was brought to quiet title. The complaint there, however, sets out facts showing a former judgment invalid; and our Supreme Court held the attack to be direct. So, in *Campbell v. Campbell*, 152 Cal. 204, an action was instituted in equity to obtain a decree adjudging defendant to hold one-half of certain property in trust for plaintiff and for an accounting on the ground that certain probate decrees were obtained by fraud. Notwithstanding the fact that the complaint did not ask that the decree be set aside, the court nevertheless held the attack to be direct, saying:

“The contention that a proceeding of the kind before us constitutes a collateral attack on the probate orders, is not well founded. It is a direct attack.”

In *Walker v. Goldsmith*, 14 Ore. 125, 12 Pac. 537, 553, it is said that when the validity of a record attacked is put in issue by the pleadings of the party attacking it, by proper averments, the attack

is direct and not collateral. And in *Dormitzer v. German Savings etc. Soc.*, 23 Wash. 132, 62 Pac. 862, the prayer of the complaint asked that a guardian's release of a certain mortgage on property belonging to a ward should be set aside and the mortgage foreclosed and for *general relief*. The allegations of the complaint, however, set up facts showing the invalidity of certain probate proceedings. And it was held that such an attack was a direct and not a collateral attack.

It is a universally acknowledged rule of equity pleading that under a prayer for general relief the complainant is entitled to any relief which the facts of his bill shall warrant. Why then is not the attack on the judgment in *People v. Davis* direct in the fullest sense of the word?

The case of *Lake v. Bonynge*, 161 Cal. 120, is not at all in point, because in that case the facts showing the invalidity of the judgment in *People v. Davis* were not pleaded in the complaint at all.

Having alleged facts in the bill in such form as requires the court to consider them, and having followed it with a prayer sufficient to invoke the aid of the court, the conclusion of the opinion that the judgment in *People v. Davis* is valid and subsisting should not, we think, be allowed to stand.

### 3. Res Judicata.

Nor do we think it should be decided that the judgments in *People v. Davis* and *Lake v. Bonyngé* are res adjudicata of this case.

While the doctrine of res adjudicata is designed to prevent the litigation of issues already decided, it should never be used to prevent the decision of an issue or right in the first instance. Now, the only question ever decided on all this litigation is that the judgment in *People v. Davis* is fair on its face. It has never been determined that the court in fact acquired jurisdiction of the defendant. That is the issue squarely presented to this court for decision in this case for the first time, as we have already undertaken to point out; and if the court should conclude that this issue is before it for decision, it would, we think, decide in keeping with the authorities cited in Sections 23 and 24 of our brief, that the decisions in the state courts are not res adjudicata on this question.

The law of res adjudicata does not depend upon the form in which an issue is presented and decided, but upon the actual fact that it has in substance been decided.

The California cases of

*Bacon v. Bacon*, 150 Cal. 484;

*Estudillo v. Security & Loan Co. etc.*, 149 Cal. 556;

*Pioneer Land Co. v. Maddux*, 109 Cal. 642;

*People v. Norris*, 144 Cal. 422,

settle this point. There it is held that a collateral attack is not res adjudicata upon a direct attack; that it is immaterial whether the issue takes the form of a direct or a collateral attack, because the substance should be regarded and not the form; so that an attack whether direct or collateral, which considers the face value, only, of the judgment record, is not res adjudicata in an attack, whether direct or collateral, made to determine jurisdiction notwithstanding the recitals of such record (Sections 23 and 24, Appellant's Brief).

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#### 4. Laches.

Turning to the question of laches, the opinion, as already pointed out, proceeds on the theory that the judgment in *The People v. Davis* is valid and subsisting and so continues until set aside by a direct proceeding instituted for that express purpose. That is to say, the court assumes that the judgment in *The People v. Davis* is at most only voidable, and since it is merely voidable it may ripen into validity by the failure of plaintiff to take steps to set it aside. The opinion also seems to conclude that a direct attack to accomplish that end must be made within the statutory period governing frauds.

Whatever might be the rule of laches, if the judgment in *The People v. Davis* were merely voidable instead of wholly void, it is, we think, unnecessary

to determine, because under the allegations of this bill, as appears from the documentary evidence attached thereto by way of exhibit, the judgment was rendered without jurisdiction of the person of defendant and is therefore totally void. Nor can appellees make any bona fide claim on the ground that the judgment in this case appeared to be valid, because it is alleged that at all times since the inception of their claim they had actual knowledge of the invalidity of such judgment.

The Supreme Court of the United States (*Shelton v. Tiffin*, 6 Howard, 186) and our own Supreme Court (*Pioneer Land Co. v. Maddux*, 109 Cal. 642) have decided that a judgment rendered without jurisdiction of the person of the defendant is an absolute nullity, no matter how fair on its face (Section 27 Appellant's Brief).

In view of the total invalidity of the judgment in *The People v. Davis*, appellant was under no duty whatsoever to litigate, and he cannot be charged with laches for failure to do so (Section 29 of Appellant's Brief).

Since the judgment in *The People v. Davis* was absolutely void, the rights of appellant still stood as though that judgment had never been rendered; and the failure to pay interest after its rendition could not constitute laches any more than did the failure to pay interest prior to that time. Such a failure to pay interest under the law and policy of this state in no wise endangers or lessens the rights

of purchasers and does not in any wise subject their rights to forfeiture on the ground of laches in the absence of a valid judgment (see *Hyde v. Redding*, 74 Cal. 500; *Spencer v. Smith*, 85 Pac. (Kans.) 573-74; and Section 30 of Appellant's Brief).

From this it follows that the rights of appellant's predecessor in January, 1900, at the inception of the Bonynge certificate of purchase was as valid as when issued, because appellant was not required, in the language of *Lapham v. Campbell*, 61 Cal. 300, to take steps to set aside the void judgment and was not required to pay interest so long as no valid proceeding to foreclose his certificate was taken. Under the law Davis had one year to pay after the judgment.

How could he be charged with laches before the judgment? This seems to us absolutely impossible. The contract between Davis and the state was definite and the law became a part of it. The state said to Davis, you can pay the interest, but if you do not do so, you can redeem from any judgment of forfeiture within a year after judgment. Could any facts in default of interest payment *before* the judgment, deprive the defendant Davis of his statutory right? Would that not be the greatest bad faith of the state? To charge Davis with laches for not doing sooner, that which the statute gave a definite time to do, would be nothing less than denying Davis the full period of time granted by the statute. There could be no laches before a judg-

No. 2278

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

THE UNITED STATES OF AMERICA,  
Appellant,

vs.

JIM HONG,  
Appellee.

In the Matter of the Application of JIM HONG for  
a Writ of Habeas Corpus.

Transcript of Record.

Upon Appeal from the United States District Court  
for the District of Arizona.

FILED

AUG 2 - 1913



No. 2278

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# INDEX OF PRINTED TRANSCRIPT OF RECORD.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[1\*] *In the District Court of the United States for  
the District of Arizona.*

In the Matter of the Application of JIM HONG for  
a Writ of Habeas Corpus.

**Petition for Writ of Habeas Corpus.**

To the Honorable Judge of the District Court of the  
United States for the District of Arizona.

The petition of Jim Hong respectfully shows to  
this Honorable Court:

**FIRST:** Your petitioner alleges that he is a person  
of Chinese descent, lawfully within the United States  
under and by virtue of a certain certificate numbered  
137,804, issued to your petitioner by the proper govern-  
mental authorities in or about the year 1892; and  
that your petitioner has since the said year at all  
times been lawfully within the United States and has  
never during said time departed therefrom.

**SECOND:** Your petitioner alleges that he is forty-  
nine (49) years of age; that he was born in Canton,  
China, and first came to the United States in or about  
the year 1874, at which time he came into this coun-  
try through the port of San Francisco, California;  
that during the period of his minority, he lived the  
greater portion of the time with his father, a person  
also of Chinese descent, who was then lawfully within  
the United States at Sacramento, in the State of Cali-  
fornia; that the father of your petitioner owned a  
butcher-shop at Sacramento, and was engaged as a  
[2] merchant in said place, and your petitioner  
during a period of his minority and until about the

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\*Page number appearing at top of page of original certified Record.

age of sixteen (16) years went to school in Sacramento and secured some slight education; that when your petitioner was about nineteen (19) years of age he went to El Paso, in the State of Texas, and worked there in a hotel as a cook.

THIRD: Your petitioner further alleges that in or about the year 1887 or 1888 he became a member of a partnership in the city of El Paso, under the name of Quon Yuen Sang; and that from or about the year 1887 or 1888 to the year 1889 your petitioner was engaged in business in the city of El Paso, Texas, with his said firm as Chinese merchants and dealers in Chinese drygoods at said time and place; that during all of the said time in which your petitioner was a member of the said firm he was engaged in buying and selling merchandise at a fixed place of business in said city, and during said time your petitioner was not engaged in the performance of any manual labor except such as was necessary in the conduct of his said business as such merchant; and that while your petitioner's name did not appear in the name and title of the said firm, it did appear in the books of the said partnership.

FOURTH: Your petitioner further alleges that about the year 1889 your petitioner went to China and departed from this country through the port of San Francisco, California; and, after a sojourn in China of about eight (8) or nine (9) [3] months, he returned to this country and was admitted into this country again through the port of San Francisco in or about the year 1890; that at the time of your petitioner's admission to this country in 1890 all of the

formalities then existing for the admission of Chinese persons to this country were duly and fully complied with by your petitioner and that his said entry into this country was open and not surreptitious, nor did he at said time or any time conceal any facts whatever concerning himself from the authorities of the United States having in charge the admission to this country of persons of Chinese descent.

FIFTH: Your petitioner further alleges that in or about the year 1892 your petitioner was engaged in business as the owner and keeper of a restaurant at Alpine, in the State of Texas; and that at or about said time an inspector of the United States Government came to your said petitioner and delivered to him a certificate, the said certificate being No. 137,804 as aforesaid, which said certificate authorized and empowered your petitioner to be and remain in the United States as a merchant, in accordance with the provisions of said certificate, to which certificate reference is hereby made as though the same were set out at length and the same made a part hereof; and your petitioner further alleges that he continued in his said business as [4] the owner and keeper of said restaurant at Alpine, Texas, until in or about the year 1894, at which time your petitioner went to the city of Houston, Texas, where he also owned and maintained a restaurant, and that at or about the same time he owned and maintained a restaurant in the city of Galveston, Texas, known as the "Bon Ton Restaurant," and that the restaurant maintained by him in Houston, Texas, was upon Travis Street in said city.

SIXTH: Your petitioner alleges that thereafter he went to Beaumont, Texas, at or about the time of the development of the Beaumont oil fields, and shortly thereafter established himself in business as the owner and keeper of a restaurant at a place not far from Beaumont known as Sour Lake, Texas; at which place your petitioner alleges he built a two-story house and engaged in the restaurant and lodging-house business in said last place named.

SEVENTH: Your petitioner further alleges that he remained in said business in Sour Lake, Texas, for a period of eight or nine months until a fire occurred at Sour Lake, Texas, which destroyed the greater portion or the whole of said town, including the dwelling and place of business of your said petitioner; and that in said fire your said petitioner lost many of his papers and much property of the value of several thousand dollars; and that in said fire much evidence, which would serve to identify your said petitioner and corroborate [5] the truth of the statements herein contained, was also destroyed; that because of the misfortune which overtook your said petitioner in the fire last referred to, and because of the destruction of his property, and the great loss consequent thereon, as aforesaid, your petitioner returned to Beaumont, Texas, and thereafter returned to San Francisco and Sacramento, California, in which places he remained until about the year 1910, at which time he came to the city of Phoenix, in the Territory of Arizona. Since the year 1910, your petitioner alleges that he has continuously been in the city of Phoenix, and that at no time since the said

year of 1910 until the present time has your petitioner departed therefrom; and that, due to his losses and misfortunes as aforesaid, your petitioner has been obliged to engage in the occupation of housekeeper in the household of the Right Reverend Julius Atwood, Bishop of Arizona, and that he has been continuously in said employ since some time in the year 1911; but your petitioner alleges that said occupation is only temporary until your petitioner is able to earn and save sufficient funds to enable him to again engage in the business of owning and keeping an independent business of his own, and your petitioner declares it to be his intention to resume his occupation as a merchant.

**EIGHTH:** Your petitioner further alleges that at all times since he attained his majority he has been continuously domiciled within the United States, and that his return to China [6] as aforesaid was only a temporary departure from the United States, and that at all times your said petitioner has regarded the United States of America as his home and only place of domicile; that on or about November 21st, 1912, your petitioner was arrested in the city of Phoenix, Arizona, under and by virtue of a warrant issued by the Honorable C. W. Johnstone, United States Commissioner, a copy of which is hereto annexed and made a part hereof and marked Exhibit "1"; and that said warrant was issued upon the complaint of O. T. Richey, Esquire, a duly qualified and acting Assistant United States Attorney for the District of Arizona, a copy of which said complaint is hereto annexed and made a part hereof and marked Ex-

hibit "2"; and that to the best of your petitioner's knowledge, information and belief the said warrant of arrest is the sole authority for your petitioner's detention, and that said complaint charges your said petitioner with being a person of Chinese descent unlawfully within the United States.

NINTH: But your petitioner alleges that the said complaint and the said warrant are fatally defective in that it appears from the face thereof that neither said complaint nor said warrant state any facts sufficient to constitute the offense of being unlawfully within the United States; nor are any facts stated from which it can appear that your petitioner is a person who is by reason or any act or omission a perso unlawfully within the United States.

[7] TENTH: Your petitioner further alleges that he is now in the custody of the United States Marshal, under and by virtue of the said warrant of arrest, and that he is held to await an order of deportation to be made under the provisions of the Chinese Exclusion Act, having reference to the deportation of Chinese persons unlawfully within the United States.

ELEVENTH: But your petitioner alleges that he has been unlawfully deprived by the officers of the United States Government, the names of whom are unknown to your petitioner, of the certificate heretofore described and referred to herein, which said certificate is the best evidence your petitioner can offer as to his right to be and remain in the United States; and your petitioner further alleges that the said inspector or officer of the Government required

your petitioner to produce his said certificate, and when your petitioner produced it, the said officer, notwithstanding the protest of your petitioner, appropriated the same and has since withheld its possession from your petitioner, which retention of said certificate has resulted in serious embarrassment to your petitioner in stating his case to his counsel, and that the said officer had no right, power or authority to deprive your petitioner of his said certificate, and said acts on the part of the said officer deprived your petitioner of his rights in and to the equal protection of the laws of the said country, and violated his right to be [8] exempt from unlawful searches and seizure.

TWELFTH: And your petitioner further alleges that, in being deprived of said certificate, he has been subjected to unlawful search and seizure of his property in violation of the provisions of the Constitution of the United States, in such cases made and provided, and that he has been denied the equal protection of the laws guaranteed to citizens of the United States and to others lawfully domiciled therein by the provisions of the said Constitution of the United States; and further, your petitioner respectfully alleges that he is now restrained and deprived of his liberty without due process of law, in violation of the "due process" clause of the said Constitution of the United States.

THIRTEENTH: Your petitioner further alleges that he still has and maintains his status in this country under and by virtue of his said certificate as a merchant, and that, in consequence thereof, neither

this Court nor the Commissioner before whom there is now pending the application of the United States to deport and remove your petitioner from the United States, have jurisdiction in the premises.

WHEREFORE, your petitioner respectfully prays that a Writ of Habeas Corpus issue out of and under the seal of this Court, directed to the Marshal of the United States for the District of Arizona, or to such other persons as may now have him in custody, to produce his body before this Court [9] to the end that he may be discharged from such unlawful restraint and custody, in accordance with the law in such cases made and provided.

JIM HONG.

State of Arizona,  
County of Maricopa,—ss.

Jim Hong, being duly sworn, deposes and says that he is the petitioner named in the foregoing petition subscribed by him; that he has read the same, and knows the contents thereof, and the said statements made are true, as he verily believes.

JIM HONG.

Sworn to by the said Jim Hong before me and by me subscribed on this 27th day of February, 1913.

[Seal]

ALLAN B. JAYNES,  
Clerk U. S. District Court.

**Exhibit 1—Warrant of Arrest.**

United States of America,  
District of Arizona,—ss.

To the United States Marshal:

Complaint on oath having been this day made before me, a United States Commissioner for the Dis-

trict of the State of Arizona, that the offense of being a Chinese person unlawfully [10] within the United States has been committed and accusing Jim Hong thereof,

YOU ARE, THEREFORE, commanded by the President of the United States forthwith to arrest the above-named Jim Hong and bring him before me forthwith at my office, in the District of Arizona, or in case of my absence, or inability to act, before the nearest and most accessible Commissioner within this District.

Given under my hand this 20th day of November,  
A. D. 1912.

[Seal]

C. W. JOHNSTONE,  
United States Commissioner.

[Endorsement]: I hereby certify that on the 21st day of November, 1912, at Phoenix, Arizona, I served the within warrant upon the within named Jim Hong and now have his body in custody.

C. A. OVERLOCK,  
United States Marshal.  
By Bernard Anderson,  
Deputy.

Dated November 21, 1912.

**Exhibit 2—Complaint Against a Chinese Person.**

[11] UNITED STATES OF AMERICA  
vs.

JIM HONG.

District of Arizona,  
County of Maricopa,—ss.

Before C. W. JOHNSTONE, United States Commissioner for said District.

**[Affidavit of O. T. Richey, Assistant U. S. Attorney.]**

O. T. Richey, being duly sworn, on behalf of the United States, deposes and says that he is a duly appointed, qualified and acting Assistant United States Attorney, that Jim Hong is a Chinese person not lawfully entitled to be or to remain in the United States, and that the said Jim Hong is now in the District of Arizona, and within the County of Maricopa thereof; wherefore affiant prays that a warrant be issued for the arrest of the said Jim Hong that he may be dealt with in accordance with law.

O. T. RICHEY.

Subscribed and sworn to before me this 20th day of November, 1912.

[Seal] C. W. JOHNSTONE,  
United States Commissioner for the District of Arizona.

[Endorsement]:

State of Arizona,  
Judicial District.

[12] I certify that the within complaint is a full, true and correct form of a complaint on file in my office.

[Seal]

C. W. JOHNSTONE,

United States Commissioner for the Judicial Dis-  
trict of the State of Arizona.

[Endorsements]: C-418. (1.) District Court of the United States for the District of Arizona. In the Matter of the Application of Jim Hong for a Writ of Habeas Corpus. (Original.) Petition for Writ of Habeas Corpus. Filed Feb. 27, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. Edward Kent, William M. Seabury, Fleming Building, Phoenix, Arizona.

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### **Writ of Habeas Corpus.**

United States of America,  
District of Arizona,—ss.

To the Marshal of the United States for the District  
of Arizona at Phoenix, Arizona.

We command you that the body of Jim Hong, in your custody detained as it is said, together with the day and cause of caption and detention, you safely have before the Honorable Richard E. Sloan, Judge of the District Court of the United States for the District of Arizona, at the Federal Building in the city of Phoenix on the 3d day of March, 1913, at the opening of court on said day at 9:30 o'clock in the morning, to do and receive all and singular those

things which the said [13] District Judge shall then and there consider of him in this behalf, and have you then and there this writ.

WITNESS, the Honorable RICHARD E. SLOAN, Judge of the District Court of the United States, this 27th day of February, 1913, and in the year of the Independence of the United States, 137.

[Seal]

RICHARD E. SLOAN,

Judge.

[Endorsements]: Marshal's Docket No. 2597. District Court of the United States for the District of Arizona. In the Matter of the Application of Jim Hong for a Writ of Habeas Corpus. (Original.) Writ of Habeas Corpus. Filed March 3, 1913. Allan B. Jaynes, Clerk. Edward Kent, William M. Seabury, Fleming Building, Phoenix, Arizona.

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#### **Order Admitting Defendant to Bail, etc.**

BE IT REMEMBERED, that heretofore and upon, to wit; the 27th day of February, in the year of our Lord one thousand nine hundred and thirteen, the same being one of the regular juridical days of the October, 1912, Term of said Court, the following order, *inter alia*, was had and entered of record in said Court in said cause, which said order is in words and figures as follows, to wit:

**[14] C-418.**

In the Matter of the Application of JIM HONG for a Writ of Habeas Corpus.

It is ordered that the petitioner be admitted to bail in the sum of Five Hundred Dollars pending the

hearing on the petition and writ herein, said bond to be approved by the Clerk (2-151).

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**Bail Bond.****BOND OF PETITIONER.**

KNOW ALL MEN BY THESE PRESENTS: That Jim Hong, as principal, and E. J. Bennett and Julius Atwood, both of the city of Phoenix, as sureties, are held and firmly bound, jointly and severally by these presents, unto the United States of America in the sum of Five Hundred Dollars (\$500.00), which sum we and each of us jointly and severally promise and agree to pay to the said United States of America.

Signed this 27th day of February, 1913.

NOW, THEREFORE, the condition of this obligation is such that if the above-named principal, Jim Hong, is produced before the District Court of the United States for the District of Arizona on the 3d day of March, 1913, at the opening of court on said day, then and there to abide the orders of the said Court, then and in that event this obligation shall be void and of no force or effect; otherwise, to remain in full force and virtue.

JIM HONG, Principal.

[15] E. J. BENNITT,  
J. W. ATWOOD,

Sureties.

State of Arizona,  
County of Maricopa,—ss.

E. J. Bennett and J. W. Atwood, being duly sworn, says each for himself that he is one of the sureties

above named and that he is worth more than five hundred dollars over and above all his just debts and liabilities, exclusive of property exempt from execution and forced sale.

J. W. ATWOOD.

E. J. BENNITT.

Subscribed and sworn to before me this 27th day of Feby. 1913.

[Seal]

ALLAN B. JAYNES,

Clerk.

[Endorsements]: C-418. (2.) District Court of the United States for the District of Arizona. In the Matter of the Application of Jim Hong for a Writ of Habeas Corpus. (Original.) Bond. Filed and Appvd. Feb. 27, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. Edward Kent, William M. Seabury, Fleming Building, Phoenix, Arizona.

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#### **Marshal's Return to Writ of Habeas Corpus.**

*In the United States District Court for the District of Arizona.*

**[16] In the Matter of the Application of JIM HONG for a Writ of Habeas Corpus.**

#### **Return to Writ.**

United States of America,  
District of Arizona,—ss.

The return of C. A. Overlock, United States Marshal for the District of Arizona, to the Writ of Habeas Corpus hereto annexed:

In obedience to the Writ of Habeas Corpus hereto annexed, I do hereby certify and return to the United States District Court for the District of Arizona, that, to the best of my knowledge, belief and understanding, neither at the time of the allowance of the said writ nor at any time since was the said Jim Hong, therein mentioned, by whatever name he may be called, in my custody, possession, or power, or by me restrained of his liberty; wherefore, and in my knowledge and belief and understanding, I cannot have his body before you, as by the said writ I am commanded.

In further return and answer to said Writ of Habeas Corpus, I respectfully submit that this Honorable Court deprived me of the custody of the person of said Jim Hong, if I had any such custody of him, the said Jim Hong, at the time the said annexed writ was served upon me, and upon the order of this Honorable Court, made at the time said hereto annexed writ was served upon me, the said Jim Hong, at that [17] time and long before it was by said hereto annexed writ commanded of me to produce to this Honorable Court the body of the said Jim Hong, was liberated and enlarged upon a bail bond of some nature to me unknown; wherefore, and in addition to the reasons hereinbefore mentioned, it is respectfully submitted to this Honorable Court that I cannot comply with said writ hereto annexed and cannot have the body of the said Jim Hong before you, as by the said Writ commanded.

C. A. OVERLOCK,

United States Marshal for the District of Arizona.

Subscribed and sworn to before me this 3d day of March, 1913.

[Seal]

ALLAN B. JAYNES,  
Clerk.

[Endorsements]: C-418. (3.) United States District Court for District of Arizona. In the Matter of Petition of Jim Hong for Writ of Habeas Corpus. Marshal's Return. Filed March 3, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. O. T. Richey, Asst. U. S. Attorney.

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*District Court of the United States, District of Arizona.*

UNITED STATES

against

JIM HONG.

**Traverse to Marshal's Return.**

**[18]** Now comes Jim Hong, the defendant above named, and the petitioner for the Writ of Habeas Corpus granted by this Court on February 27, 1913, and traverses the return of C. A. Overlock, Marshal of the United States for the District of Arizona and

I. Denies each and every allegation therein contained.

II. Your said petitioner and defendant above named further alleges that he is now on the 3d day of March, 1913, at the opening of court on that day produced before the Court in accordance with the terms of the bond made on February 27, 1913, after the granting of the writ, and that he is now in the custody of the said Marshal, and that he was in the

actual custody of said Marshal on February 27, 1913, at the time the said writ was applied for and granted.

Wherefore your petitioner, the defendant above named, prays to be discharged from custody in accordance with the prayer of his petition.

JIM HONG.

EDWARD KENT,

W. M. SEABURY,

Solicitors for Defendant.

United States of America,

District of Arizona,—ss.

Jim Hong, being first duly sworn, says he has heard read the foregoing traverse to the return of the Marshal herein, and that the same is true of his own knowledge.

JIM HONG.

[19] Subscribed and sworn to before me this 3d day of March, A. D. 1913.

[Seal]

ALLAN B. JAYNES,

Clerk United States District Court.

By Francis D. Crable,

Deputy.

[Endorsements]: C-418. (4.) United States District Court, District of Arizona. In the Matter of the Application of Jim Hong for a Writ of Habeas Corpus. Traverse to Return. Filed March 3d, at 10 A. M. Allan B. Jaynes, Clerk. By Francis D. Crable, Deputy.

**Amended Return of U. S. Marshal to Writ of Habeas Corpus.**

*In the United States District Court for the District of Arizona.*

In the Matter of the Application of JIM HONG for  
a Writ of Habeas Corpus.

The Amended Return of C. A. Overlock, United States Marshal for the District of Arizona, to the Writ of Habeas Corpus hereto annexed:

In obedience to the Writ of Habeas Corpus hereto annexed, I do hereby certify and return to the United States District Court for the District of Arizona, that, on the 27th day of February, A. D. 1913, so deponent is informed and [20] believes, Julius W. Atwood, being one of the bail for the petitioner in these proceedings, brought petitioner, Jim Hong, to the office of deponent in Phoenix, Arizona, and demanded of Bernhard Anderson, a deputy under deponent, that the said Anderson take into his custody and detain the said Jim Hong; that thereupon the said deputy did take the said Jim Hong into his custody, and so keep the said Jim Hong, for a short period, to wit, less than thirty minutes, at the said request and demand of the said bail; that thereupon and during such custody there was served upon the said Anderson and directed to deponent a Writ of Habeas Corpus hereto annexed; that said writ commanded deponent to have the body of Jim Hong before the above-entitled court at the hour of 9:30 o'clock A. M. of the 3d day of March, 1913; that

thereupon and immediately following the service of the said writ this Honorable Court ordered that the said Jim Hong be enlarged upon bail, and bail thereupon was immediately filed and deponent deprived of the custody so as aforesaid in him of the said Jim Hong, and so was continued to be so deprived of the custody of the said Jim Hong pending the full time in which deponent is by law granted to make his return to this said writ; that immediately before the opening of Court to which deponent is required to make return, the said Atwood being again the bail of this petitioner in these proceedings under an order of this Court, again brought the said Jim Hong and for the purpose of surrendering the said Jim Hong [21] to the deponent, and deponent for a short period did take the said Jim Hong into his custody at the request of his said bail and detain the said Jim Hong for a short period, and then, feeling such custody, upon advice of his counsel, was not sufficient and legal, attempted to redeliver the said Jim Hong to the said bail, and the said bail refused to retake the said Jim Hong, and deponent, being now before the Honorable Court, and having such custody as aforesaid, of the person of the said Jim Hong, does respectfully deliver the body of the said Jim Hong into this court in accordance with the directions of the said writ to be directed.

Dated at Phoenix, Arizona, this 3d day of March,  
A. D. 1913.

C. A. OVERLOCK,  
United States Marshal.

Subscribed and sworn to before me this 3d day of March, 1913.

[Seal]

ALLAN B. JAYNES,

Clerk.

[Endorsements]: No. C-418. (5.) District Court of the United States for the District of Arizona. In the Matter of the Application of Jim Hong for a Writ of Habeas Corpus. Amended Return to Writ of Habeas Corpus. Filed Mar. 3, 1913. Allan B. Jaynes, Clerk.

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**Demurrer to Amended Return [of U. S. Marshal to  
Writ of Habeas Corpus].**

District of Arizona.  
**UNITED STATES**  
against  
**JIM HONG.**

The defendant above named being [22] the petitioner for the Writ of Habeas Corpus granted herein on February 27, 1913, hereby demurs to the amended return of the Marshal for this District upon the ground that said amended return fails to state facts sufficient to constitute a valid return or cause for the detention of said defendant.

Wherefore defendant prays that he be forthwith discharged from custody as prayed in his petition for said writ.

EDWARD KENT,  
W. M. SEABURY,  
Solicitors for Defendant.

[Endorsements]: B—418. (6.) United States District Court, District of Arizona. Demurrer to Amended Return. Filed Mar. 3, 1913, at 2 P. M. Allan B. Jaynes, Clerk. By Francis D. Crable, Deputy.

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*In the United States District Court for the District of Arizona.*

In the Matter of the Application of JIM HONG  
for a Writ of Habeas Corpus.

**Second Amended Return [of U. S. Marshal to Writ of Habeas Corpus].**

The Second Amended Return of C. A. Overlock, United States Marshal for the District of Arizona, to the Writ of Habeas Corpus in the foregoing entitled proceedings directed [23] to him:

The petitioner makes no sufficient statement of matters and facts as to entitle him to any other order or relief than an order remanding him to answer to said complaint in said petition referred to and upon which petitioner admits he was arrested to answer.

The petition shows, that the Commission issuing the warrant had jurisdiction of the subject matter of the complaint. He has jurisdiction to entertain any demurrer or objection the defendant, the said Jim Hong, the petitioner in this action, might make thereto, or to either of the said warrant or the said complaint; he had jurisdiction of the body and custody of the said defendant in the said action before the said commissioner; that, notwithstanding it is required by section 754 of the Revised Statutes of the United States, said petition fails to allege and

set forth all of the facts concerning the detention of defendant, if he was detained at all. If said petition upon its face shows to this Court the conditions alleged by this return to be, then this petitioner is entitled to no relief at all and should be remanded to answer to said complaint, there being no showing of any kind whatever that petitioner herein, the defendant in said complaint, the said Jim Hong, ever at any time made any effort to or before said Commissioner for any relief in his said petition in these proceedings sought; and, petitioner should not of right be entitled to [24] come into this court for relief he might have had had he made the same showing to the Court below that he is here endeavoring to make; and respondent alleges that these proceedings now before this Court is an attempt on the part of petitioner to force the United States to prosecute the complaint; that Jim Hong is a person of Chinese descent unlawfully in the United States, in this court in the first instance instead of in the Court of United States Commissioner C. W. Johnstone, the commissioner before whom the complaint hereinbefore mentioned was filed, and who, respondent alleges, has entire and full jurisdiction in the premises of passing upon all of the contentions the petitioner set forth in his petition herein; and respondent alleges, and contends that, of right, petitioner will be required to show that he has made due attempt, in the court having jurisdiction below of the matters complained of, to there obtain the relief here sought, before he will be permitted, under the circumstances in his petition herein shown, to

move this Court for relief; respondent denies the truth of all of the allegations, claims and matters made on the part of petitioner in the following named paragraphs of his said petition, to wit: Paragraphs First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eleventh, and all of that part of paragraph Eighth from the beginning thereof to and inclusive of the word "domicile" in the third line of page five of said petition, and deponent alleges that all of [25] matter in said paragraphs, and so denied as aforesaid, even if true, are incompetent, irrelevant and immaterial for any purpose whatever in the consideration by this Court of these proceedings, and that the only matter under consideration by this Court is, whether the said United States Commissioner possesses jurisdiction in the premises complained of in the aforementioned complaint, and whether the detention, if detention there was, of petitioner was proper, and that said matters so denied, even if true, are incompetent and immaterial for any purpose whatever in the disposition of these premises.

Respondent admits that the said Jim Hong was arrested on or about the 21st day of November, 1912, upon a warrant of arrest issued upon complaint of O. T. Richey, Assistant United States Attorney, as set out in the petition of the said Jim Hong; that the copy of said complaint and said warrant as set out in the petition of the said Jim Hong are in substance, if not in fact, true copies of the originals; alleges that upon the said warrant, as is evidenced by the return thereof thereon, the said Jim Hong was

taken before said Commissioner Johnstone, and thereupon and without ever having been committed, after said return, and after the said *deliver* of the said Jim Hong to the said Commissioner as in said warrant required, the said Jim Hong was enlarged upon bail, and was never at any time by the [26] said commissioner committed to the custody of respondent or to any of the deputies of respondent; alleges that the said Jim Hong, since his release upon said bail by the said Commissioner, has never been in the custody of or detained by any United States Officer except as hereinafter set forth, and was not in any such custody or so detained or restrained of his liberty at the time of the filing of the said petition as is set forth and alleged in the said petition, nor at any time since the filing of the said petition; admits that the complaint charges the petitioner Jim Hong with being a person of Chinese descent unlawfully within the United States.

Respondent denies that the said complaint or the said warrant are at all defective, or that either are at all defective, but alleges, on the contrary, that said complaint states a perfect cause of action and that the said warrant, and that each of them, the said complaint and the said warrant, are sufficient and fully inform the defendant with the offense with which he is charged, to wit, that he is a person of Chinese descent unlawfully within the United States.

Respondent denies that allegation of the petition contained in paragraph Tenth thereof, to wit, that the petitioner was then and there in the custody of

the United States Marshal, and denies that he was in the custody of any person other than his bail, viz.: Julius W. Atwood and E. J. Bennett; denies that petitioner was held to await an order of [27] deportation to be made, but alleges that petitioner was under bond to appear before the said Commissioner Johnstone for trial to be had on the 3d day of March, 1913, such trial to be had for the purpose of determining whether the said Jim Hong was or was not, or is or is not, a person of Chinese descent, unlawfully within the United States, and respondent attaches hereto a copy of said bail bond and marks the same Exhibit "A," and makes the same a part hereof.

Respondent admits that pending the trial of the said Jim Hong upon the said complaint hereinbefore mentioned, his said certificate or residence was seized and held by agents of the Government of the United States, and that said certificate is now in the possession of such agents, and will be so held by such agents subject to the use of the said Jim Hong as evidence of his right to be and remain within the United States, and will be preserved for and be delivered to him in event it be shown that he be entitled to be and remain within the said United States, being pending the result of the said trial before the said Commissioner Johnstone; and respondent alleges such procedure is the practice, that it is lawful and proper, and the only course open to the Government by which it can protect itself against fraud in such cases; and alleges the only damage petitioner could suffer from such detention

is that he is prevented the use of his certificate to travel around the country pending his trial before the said commissioner; and alleges that petitioner's right to such certificate and to the use thereof [28] depends upon the determination of his right to be and remain within the said United States, and such right is but a privilege granted by the United States under its regulations and for the purpose of successfully protecting itself against constant fraud; respondent denies that the officer and agent of the Government had no right, power or authority of law to temporarily deprive petitioner of said certificate, and denies that such deprivation deprived petitioner of any right he may have had or now has in and to the equal protection of the laws of the United States, and denies that such deprivation violated petitioner's right to be exempt from unlawful searches and seizures, and denies that, being so deprived, petitioner has been subjected to unlawful seizure and search of his property in violation of the provisions of the Constitution, or any of the provisions thereof, of the United States, and denies that petitioner has been denied the equal protection of the law guaranteed to citizens of the United States and to others lawfully domiciled therein by the provisions of the said Constitution of the United States, and denies that, as alleged in the latter part of the twelfth paragraph of said petition, petitioner was then, or is now, restrained and deprived of his liberty without due process of law, in violation of the "due process" clause of the said Constitution of the United States, and denies that petitioner has or maintains such a

status as that he should not be put to the test required by the laws [29] of the United States and the Rules and Regulations thereunder promulgated, and a proper complaint having been filed, although it being not necessary or by law, rule or regulation required that a written complaint be filed, and the petitioner having been by competent legal authority ordered to show cause why he should not be deported he should be compelled to make the legal showing required. Respondent is informed, and upon such information so believes it to be true, and therefore states the facts to be, that on several occasions petitioner, through his several counsel, at and from the time of his arrest upon said complaint and warrant, petitioner has made requests for continuances and such requests as often granted for the trial under said complaint; that it is no fault of the United States that the trial of Jim Hong before the said Commissioner upon said complaint has not long ago been had; that these proceedings are instituted solely and for no other purpose than for the purpose of forcing the United States to try the right of this petitioner to be and remain within the United States, in this Court, in the first instance instead of before the said United States Commissioner before whom the said complaint against this petitioner was made; that on or about the 27th day of February, 1913, this petitioner, the defendant in the court below, and being then under bail bond as hereinbefore set forth, was taken, and he voluntarily accompanied one of his said bail, viz., the said Atwood, and for the purpose on the part of the said [30]

bail and the said defendant that he, said defendant, be surrendered, in accordance with the provisions governing such cases, to the proper authority, and that such taking into custody and such intention to surrender and to be so surrendered was not *bona fide*, but was for the sole and only purpose of being a means and a part of the scheme to have this Court try out in the first instance the right of this petitioner to be and remain within the United States and to take him away from the jurisdiction of the said Commissioner. Respondent alleges, that in order to properly surrender a person under a bond for appearance, it is provided by the laws of the United States how such shall be accomplished, to wit, section 1018 of the Revised Statutes of the United States, and such provision requires such surrender to be made to the marshal or his deputy jointly with the officer authorized to commit the person being surrendered, and that such officer shall, upon request of his bail, commit the person so surrendered to the custody of the marshal and endorse on the recognizance or a certified copy thereof the discharge and exoneretur of the bail, and the person so committed shall therefrom be held in custody until discharged by due course of law; and, alleges that such course was not pursued in the surrender of the said Jim Hong in the surrender aforesaid; alleges that until said course in the surrender of the said Jim Hong be pursued petitioner must legally be constructively in the custody of his bail from whose liability it was [31] attempted to surrender him; alleges that the said bail made an attempt to surrender the

said Jim Hong, but therein failed, and the said Jim Hong is now and at all times since the execution thereof has remained subject to the conditions of said bail; that the person to whom the said bail attempted to surrender the said Jim Hong, to wit, a deputy of respondent, believing it to be his duty and legal to accept and detain the said Jim Hong upon the demand of the said bail without other procedure, did at the instance of and for the said bail take charge of the said Jim Hong; alleges that if that detention, custody and restraint is what the said Jim Hong is petitioning to be relieved from, on the grounds that such detention and restraint was and is occasioned without due process of law, he fails to state any such facts as to entitle him to relief therefrom; alleges that said Jim Hong has at no time been duly surrendered under the bond required by and filed with the Commissioner aforesaid, and the bail in said bond are now responsible for the appearance of petitioner before the said Commissioner to answer to said complaint; alleges that the only time during which the said Jim Hong was in custody, detention and restraint under said complaint was during the time between his first having been taken into custody on the said warrant and his delivery to the custody of the commissioner thereon where such detention continued until his bond was filed as hereinbefore set out, [32] and that any custody by the said deputy and such as was attempted by said bail by means of the said attempted surrender was not such custody as to be a part of or authorized in any of the proceedings before the said Commissioner so as to relieve the

bail, and that such custody must have been for the bail by its agent, the deputy possessing no commitment or order of any competent authority in the premises in due course, and, therefore, necessarily acting solely in the capacity of agent of the bail.

Wherefore, and in obedience to the Writ of Habeas Corpus hereinbefore mentioned, I do hereby certify and return to the United States District Court for the District of Arizona, that on the 27th day of February, A. D. 1913, as I am informed and verily believe, as hereinbefore stated, and set forth, the said Atwood, being then and there one of the bail of petitioner in the said complaint proceedings brought the said Jim Hong, the petitioner in these proceedings, to the office of respondent in Phoenix, Arizona, and demanded of Bernhard Anderson, a deputy of respondent as aforesaid herein, that the said Anderson take into his custody and detain the said Jim Hong; that, thereupon, the said deputy did take the said Jim Hong into his custody and so keep him for a short period, to wit, less than thirty minutes, at the said request and demand of the said bail; that thereupon, and during such custody, there was [33] served upon the said Anderson and directed to respondent a Writ of Habeas Corpus, commanding me that I have the body of Jim Hong before the said Court, at the hour of 9:30 o'clock A. M. on the 3d day of March, 1913; that, thereupon, and immediately following the service of said writ as aforesaid, this Honorable Court ordered that the said Jim Hong be enlarged on bail, the bail was thereupon immediately filed and respondent thereby de-

prived of the custody so as aforesaid in him of the said Jim Hong, and so was continued to be so deprived of the custody of the said Jim Hong pending the full time in which respondent is by law, and was by said writ granted to make return to said writ; that immediately before the said hour of the opening of this court, and immediately before respondent was by said writ required to have the body of the said Jim Hong before this Court, the said Atwood, being again the bail of the said Jim Hong in these proceedings under the said order of this Court, again brought the said Jim Hong to respondent's said office for the purpose of again surrendering him to respondent, and respondent for a short period of time did take the said Jim Hong into his custody at the request of his said bail and detain him for a short period, and then, feeling such custody, upon the advice of his counsel, was not sufficient and legal, respondent attempted to redeliver the said Jim Hong to his said bail, but the said bail refused to retake the said [34] Jim Hong, and respondent, being now before the Honorable Court, and having such custody as aforesaid of the person of the said Jim Hong, does respectfully deliver the body of the said Jim Hong into this court in accordance with the directions of the said writ to me directed.

Dated at Phoenix, Arizona, this 3d day of March,  
A. D. 1913.

C. A. OVERLOCK,  
United States Marshal.

[Endorsements]: C-418. (7.) In District Court of the United States, District of Arizona. In Matter of the Application of Jim Hong for a Writ of Habeas Corpus. Second Amended Return to Writ. O. T. Richey, Asst. U. S. Atty. Filed Mar. 3, 1913. Allan B. Jaynes, Clerk.

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**[Defendant's Exhibit No. 1—Certificate of Collector of Internal Revenue of Residence of Jim Hong, etc.]**

[35] No. 137804. Original.

UNITED STATES OF AMERICA.

CERTIFICATE OF RESIDENCE.

Issued to Chinese person other than laborer under the Provisions of the Act of May 5, 1892, as amended by the Act approved November 3, 1893.

THIS IS TO CERTIFY That Jim Hong, a Chinese person, other than laborer, now residing at Alpine, Texas, has made application No. 865 to me for a Certificate of Residence, under the provisions of the Act of Congress, approved May 5, 1892, as amended by the Act approved November 3, 1893, and I certify that it appears from the affidavit of witness submitted with such application that said Jim Hong was within the limits of the United States at the time of the passage of said Act and was then residing at Alpine, Texas, and that he was at the time lawfully entitled to remain in the United States, and that the following is a descriptive list of said Chinese person, other than laborer, viz.: Name, Jim Hong. Age, 28 years. Local residence, Alpine, Texas. Occupation,

Restaurant-keeper. Height, 5 ft. 7½ in. Color of eyes, dark brown. Complexion, swarthy. Physical marks or peculiarities for identification, scar on the back of right forearm; scar on knuckle of left hand (under finger); several scars over left ear.

And as a further means of identification, I have affixed hereto a photographic likeness of said Jim Hong.

[36] Given under my hand and seal this third day of May, 1894, at Austin, Texas.

J. EDWARD KAUFFMAN,  
Collector of Internal Revenue, 3 District of Texas.  
(Photograph)

Jim Hong.

137804.

[Endorsements]: C-418. (8.) Defendant's Exhibit 1. Filed Mar. 3, 1913. Allan B. Jaynes, Clerk.

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**[Minutes of Court—March 3, 1913.]**

BE IT REMEMBERED that heretofore and upon, to wit, the 3d day of March, 1913, the same being one of the regular juridical days of the October, 1912, Term of said Court, the following order, *inter alia*, was had and entered of record in said court, in said cause, which said order is in words and figures as follows, to wit:

C-418.

In the Matter of the Application of JIM HONG for  
a Writ of Habeas Corpus.

This matter came on this day regularly to be heard upon the Writ of Habeas Corpus issued herein and

the return of the United States Marshal thereon, Wm. M. Seabury, Esquire, and Edward Kent, Esquire, appearing as counsel for the petitioner and O. T. Richey, Esquire, Assistant United States Attorney appearing on the part of the United States. Whereupon the Assistant United States Attorney moved for leave to intervene [37] on behalf of the United States, which motion was by the Court denied, to which ruling of the Court the Assistant United States Attorney for the United States excepted. And thereupon said matter came on to be heard upon the Marshal's return to the writ and the petitioner's traverse to said return, and the petitioner, to maintain upon his part the issues herein, called as a witness Wm. M. Seabury, who was duly sworn, examined and cross-examined and also introduced certain documentary evidence, and the question of jurisdiction being fully submitted to the Court, and the Court having considered the same and being fully advised in the premises, finds that the Court has jurisdiction of the body of the petitioner herein. Whereupon, the United States, through the Assistant United States Attorney, excepts to said ruling. And now the United States Marshal requests leave to file an amended return, which leave is by the Court granted. The petitioner thereupon, through his counsel, moved the Court for judgment on the pleadings. Argument of the respective counsel was had, and the United States Marshal thereupon moved the Court for leave to file a second amended return, which leave was by the Court granted. Counsel for the petitioner then asked that

the demurrer of the petitioner to the first amended return of the Marshal stand as to the second amended return of the Marshal, which leave is by the Court granted. Counsel for the petitioner then renewed its motion for judgment on the pleadings. Argument of the respective counsel was had, and the case being fully [38] submitted to the Court, and the Court being fully advised in the premises, does grant said motion and orders that the petitioner be discharged from custody in accordance with the judgment to be signed and filed herein. It is further ordered that the Clerk retain the certificate of residence of the petitioner for thirty days, when it is to be delivered to the petitioner in the event no appeal is taken in this case. The United States, through the Assistant United States Attorney, excepts to the ruling of the Court in granting the motion for judgment on the pleadings and discharging the petitioner, and gives notice of appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit. (2-164.)

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**[Order Discharging Petitioner from Custody.]**

*In the District Court of the United States, in and for  
the District of Arizona.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JIM HONG.

Defendant.

## FINAL ORDER.

Upon the petition of Jim Hong, the defendant above named, for a Writ of Habeas Corpus, duly verified February 27th, 1913, and the exhibits thereto attached, and upon the return of C. A. Overlock, Marshal of the United States, filed March 3d, 1913, and upon the amended return thereto, [39] and the demurrer to said amended return, and upon the second amended return of said Marshal thereto and the demurrer to said second amended return, and the said Jim Hong, through his counsel, having moved the Court for judgment upon the pleadings, discharging the said Jim Hong from custody, and the matter having been heard in open court, and full argument having been made by counsel for the Government in opposition to said motion for judgment on the pleadings, and by counsel for the said Jim Hong in support of said motion, and the Court being fully advised in the premises and due deliberation having been had; and it appearing to the Court's satisfaction that the said Jim Hong is now and at all times since the issuance to said Jim Hong of a certificate numbered 137,804, heretofore duly issued by the officers of the Government of the United States to the said Jim Hong, has been a person lawfully within the United States, and that the said Jim Hong is the person named therein, establishing the right of the said Jim Hong under said certificate lawfully to be and remain within the United States;

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DETERMINED that the said Jim Hong is now lawfully within the United States, un-

der and by virtue of the said certificate 137,804; and that he is now unlawfully restrained of his liberty.

AND IT IS FURTHER ORDERED, ADJUDGED AND DETERMINED that the said Jim Hong be and he hereby is discharged from custody.

[40] Done in open court, this 3d day of March, 1913.

RICHARD E. SLOAN,  
United States District Judge.

[Endorsements]: No. C-418. (9.) District Court of the United States for the District of Arizona. United States of America, Plaintiff, vs. Jim Hong, Defendant. (Original.) Final Order. Filed Mar. 3, 1913. Allan B. Jaynes, Clerk. Edward Kent. William M. Seabury, Fleming Building, Phoenix, Arizona.

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[Petition for Appeal.]

[41] *In the United States District Court for the District of Arizona.*

In the Matter of the Application of JIM HONG for a Writ of Habeas Corpus.

To the Honorable WILLIAM W. MORROW, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, Assigned to and Presiding Within the District of Arizona.

C. A. Overlock, the Marshal of the United States for the District of Arizona, being the respondent in the foregoing entitled cause, feeling and considering himself and the Government of the United States of America aggrieved by the rulings and the final order

and decree made and entered in said cause under date of March 3d, A. D. 1913, wherein and whereby, among other things, it was ordered, adjudged and decreed that the said Jim Hong be discharged from custody, and does hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said order and decree, and from said mentioned rulings, and particularly from that part thereof which directs that said Jim Hong be discharged, for the reasons set forth in the assignment of errors which is filed herewith; and respondent prays that this his petition for his said appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, be sent to the said United States Circuit Court of Appeals for the Ninth Circuit.

Dated May 15th, 1913.

J. E. MORRISON,  
United States Attorney for the District of Arizona.

[42] O. T. RICHEY,  
Assistant United States Attorney for the District of  
Arizona,

Attorneys for the Respondent.

**Order [Allowing Appeal].**

The foregoing petition on appeal is granted and the claim of appeal therein is allowed.

Done this 19th day of May, A. D. 1913.

WM. W. MORROW,  
Judge of the Circuit Court of Appeals for the United  
States, in and for the Ninth District, Assigned  
to and Presiding Within the District of Arizona.

[Endorsements]: C-418. In the United States  
District Court, District of Arizona. In the Matter

of the Application of Jim Hong for a Writ of Habeas Corpus. Petition on Appeal and Order. Filed May 26, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. J. E. Morrison, United States Attorney, O. T. Richey, Assistant United States Attorney, Attorneys for Respondent.

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*In the United States District Court for the District  
of Arizona.*

In the Matter of Application of JIM HONG for  
a Writ of Habeas Corpus.

**Assignment of Errors.**

Assignment 1 of Errors.

The ruling of the Court denying the Government of the United States, through its proper United States Attorney, the privilege of intervening, and refusing to permit the United States to intervene in its own behalf, and in addition to any [43] return the United States Marshal for the District of Arizona might make.

Assignment 2 of Errors.

The ruling of the Court that it had jurisdiction of the body of petitioner.

Assignment 3 of Errors.

The ruling of the Court that the petitioner should have judgment on the pleadings, and the granting of judgment and decree on the pleadings.

Assignment 4 of Errors.

The discharging of the petitioner without the introduction of the evidence offered by respondent, to wit, the testimony of two competent, material and

reliable witnesses that petitioner had been in Mexico for several years since the issuance to petitioner of the Certificate of Residence.

Assignment 5 of Errors.

The finding and determining by the Court without a trial thereof that Jim Hong, petitioner, is lawfully within the United States, the court on *habeas corpus* proceedings possessing no jurisdiction or authority whatever to make any such finding or decree, nor to try such issue on *habeas corpus* proceedings.

Assignment 6 of Errors.

The finding of the Court that the petitioner was unlawfully restrained of his liberty.

Assignment 7 of Errors.

The Final Order and Decree is contrary to law and to the pleadings and the facts.

Assignment 8 of Errors.

The Court exceeded its jurisdiction in making any finding whatever other than: whether it obtained and had jurisdiction [44] of the subject matter; whether it had jurisdiction of the body of petitioner; whether petitioner was unlawfully restrained of his liberty.

Assignment 9 of Errors.

The ruling of the Court that Section 1018 of the R. S. of U. S. does not obtain in the surrender of a

defendant on bail in Chinese Exclusion actions before U. S. Commissioners.

J. E. MORRISON,  
United States Attorney for the District of Arizona,  
O. T. RICHEY,  
Assistant United States Attorney for the District of  
Arizona,  
Attorneys for Respondent.

[Endorsement]: C-418. In the United States District Court, District of Arizona. In the Matter of the Application of Jim Hong for a Writ of Habeas Corpus. Assignments of Error. Filed May 26, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy. J. E. Morrison, U. S. Attorney, O. T. Richey, Asst. U. S. Attorney, Attorneys for Respondent.

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**[Praecept for Transcript of Record.]**

*In the United States District Court for the District of Arizona.*

In the Matter of Application of JIM HONG for a Writ of Habeas Corpus.

**PRAECEIPE FOR THE RECORD ON APPEAL.**

To Allan B. Jaynes, Esq., Clerk of United States District [45] Court for the District of Arizona:

You will please, in accordance with the Order and Citation of the above-entitled Court, include in the transcript on appeal the following matter, viz., Petition for Writ of Habeas Corpus, Writ of Habeas Corpus, Order Admitting Petitioner to Bail, Bond of Petitioner, Marshal's Return, Amended Return

and Second Amended Return, Traverses to Returns, Demurrers to Returns, exhibits, minute entries of the proceedings, Final Order, Petition on Appeal, Order Allowing Appeal, and all other matters and filing appertaining to the foregoing entitled action and the appeal therein.

J. E. MORRISON,

United States Attorney for the District of Arizona,  
and

O. T. RICHEY,

Assistant United States Attorney for the District of  
Arizona,

Attorneys for Respondent.

[Endorsement]: C-418. United States District Court, District of Arizona. United States vs. Jim Hong. Prae. on Appeal. Filed May 29, 1913. Allan B. Jaynes, Clerk. By Frank E. McCrary, Deputy.

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**[Order Directing Clerk to Prepare Certified  
Transcript of Record.]**

**[46] In the United States District Court for the  
District of Arizona.**

No. C-418.

In the Matter of the Application of JIM HONG for  
a Writ of Habeas Corpus.

Upon motion of O. T. Richey, Esquire, Assistant United States Attorney for Arizona, and it appearing to the Court that the Attorney General has directed that an appeal be taken in this case on behalf of the United States, it is by the Court ordered that the Clerk prepare and certify a transcript of the

record in this case at the expense of the United States.

Dated this 31st day of May, 1913.

WILLIAM W. MORROW,  
Judge U. S. Circuit Court of Appeals, Presiding as  
Judge of the U. S. District Court for the District  
of Arizona.

[Endorsements]: United States District Court,  
District of Arizona. In the Matter of the Application  
of Jim Hong for a Writ of Habeas Corpus.  
Filed June 4th, 1913. Allan B. Jaynes, Clerk. By  
Frank E. McCrary, Deputy.

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**[Certificate of Clerk U. S. District Court to  
Transcript of Record.]**

[47] United States of America,  
District of Arizona,—ss.

I, Allan B. Jaynes, Clerk of the United States District Court for the District of Arizona, do hereby certify that the foregoing pages, 1 to 46, constitute and are a true, complete, and correct copy of the record pleadings and proceedings had In the Matter of the Application of Jim Hong for a Writ of Habeas Corpus, No. C-418, as the same remain on file and of record in said District Court, and I also annex and transmit the original citation in said action.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at the city of Phoenix, in said District of Arizona, this 9th day of June, A. D. 1913, and of the

Independence of the United States of America the  
one hundred and thirty-seventh.

[Seal] ALLAN B. JAYNES,  
Clerk United States District Court for the District  
of Arizona.

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[Endorsed]: No. 2278. United States Circuit  
Court of Appeals for the Ninth Circuit. The United  
States of America, Appellant, vs. Jim Hong, Appel-  
lee. In the Matter of the Application of Jim Hong  
for a Writ of Habeas Corpus. Transcript of Record.  
Upon Appeal from the United States District Court  
for the District of Arizona.

Filed June 14, 1913.

FRANK D. MONCKTON,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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UNITED STATES OF AMERICA,

Appellant,

vs.

JIM HONG,

Appellee.

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In the Matter of the Application of JIM HONG for  
a Writ of Habeas Corpus.

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Supplemental  
Transcript of Record  
Filed by and on Behalf of Appellee.

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Upon Appeal from the United States District Court  
for the District of Arizona.

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FILED  
SEP 4 - 1913



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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UNITED STATES OF AMERICA,  
Appellant,  
vs.  
JIM HONG,  
Appellee.

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In the Matter of the Application of JIM HONG for  
a Writ of Habeas Corpus.

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Supplemental  
Transcript of Record  
Filed by and on Behalf of Appellee.

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Upon Appeal from the United States District Court  
for the District of Arizona.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the  
District of Arizona.*

In the Matter of the Application of JIM HONG for  
a Writ of Habeas Corpus.

**Supplemental Transcript of Record.**

Hearing had before Hon. RICHARD E. SLOAN,  
Judge of the District Court of the United States, for  
the District of Arizona, on the 3d day of March, 1913.

**Names and Addresses of Counsel.**

Appearances:

For Jim Hong: Hon. EDWARD KENT, WILLIAM  
M. SEABURY, Esq.,  
Fleming Building, Phoenix, Arizona.

For the United States: O. T. RICHEY, Esq., Assistant  
United States Attorney,  
Phoenix, Arizona.

Stenographic Report of Proceedings made by RAYMOND ALLEE.

**[Report of Proceedings Had March 3, 1913.]**

[1\*] The COURT.—Have you seen the return?

Mr. SEABURY.—I have seen a copy of it, if your Honor please. I don't think my copy is complete.

Mr. RICHEY.—(Hands return to counsel.)

Mr. SEABURY.—I have seen the return, if your Honor please; we desire to traverse the return and file herewith with the Clerk the traverse of the petitioner. We may state, if your Honor please, that the subject of the traverse is that the petitioner denies the allegations of the marshal to the effect

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\*Page-number appearing at top of page of original certified Record.

that, at the time of the granting of the writ, he was not in the actual custody of the marshal; and we say that, at the time of the application for the writ, the prisoner had been surrendered formally to the deputy marshal, Mr. Anderson, and had been expressly placed in his custody by his bail and with the statement that his bail would be no longer responsible for him; and, thereupon, application was made to your Honor for a writ of *habeas corpus* returnable this morning, and after the writ was granted and pending determination of the petition, a bail bond was furnished that he would be produced here this morning. We are here pursuant to that bond, and we have again surrendered him to the marshal [2] and now contend that he is in the custody of the marshal. The learned Commissioner, before whom this proceeding was pending, has directed my attention to the fact that the more regular practice would have been to have made the appearance before the Commissioner and made the surrender before him under the bond which was given before the Commissioner. The bondsmen agreed to produce the prisoner before the Commissioner this afternoon at 2 o'clock, and our position with reference to that is that one of two things will take place at 2 o'clock: If the prisoner is released from the custody in which he is now held, under and by virtue of the terms of the writ granted by this Court, he will be produced for the purpose of discharging his bond; and, if he is not in such a position, he is necessarily in the custody of this Court, and that will be a complete and absolute discharge so far as the Commissioner is con-

cerned; and, for that reason, we ask that we be permitted to proceed with the examination before this Court.

Mr. RICHEY.—The marshal in his reply—his return, if the Court please, made the return upon the basis of the law governing the surrender of bail so far as he was able to ascertain it to be. There being no special provision of the federal statute [3] governing the surrender of an alien who has been charged with being unlawfully within the United States, the marshal assumes that the law governing such would be the criminal law, as that part of the proceedings in the bringing of the alien before the Commissioner is criminal in its nature and is a quasi-criminal action. It is provided that the actual trial before the Commissioner shall be done in accordance with the civil rules of practice, but up to that time it appears that the criminal laws would govern his arrest, the disposition of his arrest, and his appearance before the Court to answer to the charges made, and upon the final proceedings, as to the introduction of the evidence and the disposition of the trial, it then becomes criminal again. The Commissioner, or the Court before whom the trial takes place, either discharges the defendant or he orders him deported and commits him to the custody of the United States marshal. Now, the basis upon which the marshal makes that return, in all conscious intent, not with any intent to avoid or evade, is Section 1018 of the federal statutes.

The COURT.—Of the Revised Statutes?

Mr. RICHEY.—Yes, your Honor, Section 1018,

entitled, "The Surrender of Criminals by their Bail."

[4] This provides that: "Any party charged with a criminal offense and admitted to bail may, in vacation, be arrested by his bail and delivered to the marshal or his deputy, or before any judge or other officer having power to commit for such an offense, and, at the request of such bail, the judge or other officer shall recommit the party so arrested to the custody of the marshal and endorse on the recognizance, or certified copy thereof, the discharge and exoneratur of such bail, and the party so committed shall therefrom be held in custody until discharged by due course of law." Now, it is the contention of the marshal that that is the provision under which, and the only provision under which this defendant can be surrendered by his bail; and, if there is no specific provision, that is the provision which would apply. Now, if it is contended that it is of a civil nature, the laws of the State should apply, and we should have to resort to the criminal law of the State as to the surrender of bail, as we have no civil law in the State which would govern the surrender of a defendant by bail. It is contended by the marshal that, if the defendant was in the custody of the marshal at that time, he was not in custody as the result of the proceedings against him before the Commissioner [5] but he was in custody as the representative of the bail until such time as they complied in full as required by law as to the surrender; and, while the deputy in this case was not informed and while we do not feel entirely informed in the premises, at the same time we feel that, and be-

lieve that, the defendant was not in our custody in the case; that, as he was not in our custody, and it is that custody that this petition is directed against, we do not contend that he had been released from that custody, but in being released from that custody, he is remanded to his bail, the bail given before the Commissioner, and, if the bail then desire to relieve themselves, they will take him before the Commissioner and the marshal, and his deputy, will then appear and he will then, at the request of the bail, be recommitted or committed to the custody of the marshal. Now, the marshal not being aware of a great many matters connected with this matter and this action, I have been somewhat at a loss to know just what procedure might be taken, and the United States at this time asks that it be permitted to intervene and file a pleading of intervention, containing a full statement of all of the facts and all of the matters which the petition fails to state—matters in addition to [6] which the petition fails to state—the petition does not state all of the facts; it does not state all of the matters, and the United States through myself requests at this time to be permitted to file an intervening pleading setting forth all of the facts—the matters which the marshal would have no knowledge of.

The COURT.—Waiving jurisdiction of the question?

Mr. RICHEY.—No, your Honor. We will claim that this Court has only the power in these proceedings to inquire in the jurisdiction of the Commissioner before whom the complaint was filed in this

case. The Commissioner has endeavored to make a plain statement of fact—a plain statement of the contention of the Government in regard to this defendant—claiming all the time that this court may inquire—

The COURT.—If, at the time of the issuance of the writ, the prisoner was not in custody, I presume that is jurisdictional—that is a matter to be determined.

Mr. RICHEY.—Yes, your Honor.

The COURT.—And if it could be determined that he was in custody, if the writ was properly issued, the question is upon the sufficiency of the return—  
[7] the marshal may be permitted to amend the return.

Mr. RICHEY.—If the Court will determine that he was in custody—

The COURT.—I see no reason for intervention by the Government. The Government is here; the marshal makes the return and that raises the question that the Government has the right to appear without filing a plea of intervention.

Mr. RICHEY.—I had formulated a statement of the facts of the case, and did not know how else it could be filed.

The COURT.—I don't think that is necessary. The Government is a party in that sense.

**[Proceedings Had Concerning Statement of Facts,  
etc.]**

Mr. RICHIE.—May I, then, proceed to make a statement of all of the facts in the matter?

Mr. SEABURY.—We object to the statement, in

the first place, because your Honor suggested the preliminary question should be determined first.

The COURT.—Yes.

Mr. SEABURY.—And, moreover, no such statement is contained in the return and we are bound by the papers filed in the court and the Government is concluded by that record. May I be sworn, if your Honor please?

(William M. Seabury was duly sworn.)

[8] Mr. RICHEY.—We may be able to eliminate any testimony or anything of that kind by the admission of certain facts. My understanding is, and we will not contend but what one of the bail, Bishop Atwood, brought up this defendant before the United States Marshal Bush Anderson, and attempted—I use the word “attempted” because I do not think it was in fact—and attempted to deliver this prisoner into the hands of the United States Marshal as the result of the pleading before Commissioner Johnstone, and Mr. Anderson, believing that that was proper, accepted him in the belief that it was proper and held him long enough for the petition to be filed here and the writ to be served on him; then the defendant was brought into Court, as I am informed, and delivered on bail by the same bail that delivered him to Mr. Anderson.

The COURT.—The question, then is whether as a matter of law, the marshal obtained custody of the defendant applicant for the writ.

Mr. RICHEY.—In a way—whether there was a custody in the Commissioner in the proceedings be-

fore the Commissioner or whether there was a custody without any authority of law—we would like to know what the contention is—whether it is a contention [9] without any authority of law or whether it is a contention that he was taken into custody as a part of the proceedings before the Commissioner. We are unable to determine from the petition just what is the claim.

Mr. SEABURY.—If your Honor please, I would like to make an offer of proof of what we are prepared to prove by witnesses, by whom we are prepared to prove it if Mr. Richey on behalf of the Government will not concede that the witnesses, if so called, would so testify.

Mr. RICHEY.—That is all right.

The COURT.—Very well.

Mr. SEABURY.—The petitioner for the writ of *habeas corpus*, who is now the defendant in this proceeding, the writ having been issued, offers to prove by the testimony of the Right Reverend Julius Atwood, Bishop of Arizona, and by the testimony of William M. Seabury, one of his counsel, that on February 27th, 1913, Bishop Atwood, as one of the bondsmen in whose custody the defendant was then held, and his said counsel then appeared at the office of the United States marshal in the Federal Building in the City of Phoenix, Arizona, and stated to the deputy marshal Mr. Bush Anderson, that they then and there surrendered [10] to him, as United States marshal, the custody of Jim Hong, the defendant above named; that counsel stated to the marshal at that time that the bondsmen of the prisoner would

no longer be responsible for his custody, and that the prisoner was left entirely under the control of the marshal; that thereafter, and while the prisoner was in the custody and under the control exclusively of Mr. Anderson, as such deputy marshal, the defendant's counsel appeared before the United States District Judge and presented a petition for a writ of *habeas corpus*, which petition was allowed and the writ issued, returnable on March third, 1913; and thereupon, and after the writ had been issued by the Court, the counsel for the defendant applied to the Court for bail, and the Court directed that the prisoner be enlarged and admitted to bail pending the determination of the proceedings on the writ of *habeas corpus*. Thereafter a bail bond was duly executed before the Clerk of the court by the same sureties who had formerly been upon the bond of the defendant, under the conditions of which bond the sureties were required to produce the defendant before the District Court of the United States at the opening thereof on March third, 1913, and to abide the further orders of the [11] District Court; and, further, upon the morning of March third, 1913, at the opening of court on that day, the same defendant was produced before the Court and was again tendered to the United States marshal together with the statement that he was then and there in the custody of the marshal and no longer in the custody of the bail, and that such tender was made by the same bondsmen; and that, thereupon, while in such custody, the traverse of the marshal's return was duly verified and thereafter filed; and that is what

we desire to prove by oral testimony unless Mr. Richey will concede that the statements of fact are true.

Mr. RICHEY.—We will admit that.

Mr. SEABURY.—With the reservation to the Government's attorney to the effect that he does not concede what the legal effect of such acts may be.

Mr. RICHEY.—Except the Government will claim that the legal effect of the attempted delivery to the United States marshal only made the United States marshal an agent of the bail.

The COURT.—You admit the facts—the truth of what they propose to show?

Mr. RICHEY.—Yes, your Honor; except that the marshal upon the attempted delivery of the prisoner [12] in his custody at the opening of court of March third, 1913, refused to take custody except that the defendant be brought before the Court, and the bail there exonerated and the prisoner delivered to the marshal as the result at that time.

Mr. KENT.—That is not exactly so. The bail in my presence surrendered the defendant to the marshal this morning, the marshal accepted him and then came into court, and the United States attorney advised him—advised him what, I don't know.

Mr. RICHEY.—As soon as the marshal consulted me, he rescinded the act and attempted to turn him back for he had no right to accept him.

Mr. SEABURY.—But, however, counsel for the petitioner declined to accept him, and stated to the marshal that, irrespective of anything the marshal might say, counsel respectfully contended that the

prisoner was in his custody and he alone would be responsible for him. Will your Honor hear any argument on the question?

The COURT.—Yes; what have you to produce in behalf of this matter—any authorities here?

Mr. RICHEY.—In reference to the surrender?

The COURT.—Yes.

Mr. RICHEY.—No; merely the provision of the [13] statutes. I know of nothing else—have been unable to find anything else.

[Argument, etc.]

Mr. SEABURY.—Now, if your Honor please, we claim that Section 1018 of the United States Revised Statutes is merely directory in its character, and that, by no possibility could Congress have intended to at all have deprived bail of the right to surrender the prisoner at any time in their own exoneration. It is fundamental that when a bondsman executes a bond and takes into his possession and custody a prisoner returnable before a court on a certain day, that he has the inevitable right to relieve himself of that responsibility by returning the prisoner to the custody from which he came. Now, the custody from which the prisoner was relieved at that time was the custody of the United States marshal, and that custody existed under and by virtue of the original warrant which was issued by the Commissioner for the arrest and detention of the prisoner awaiting deportation. It seems to me that the conclusive answer to the contention of the Government, if your Honor please, is this aspect of the situation: we are here in court with the prisoner, disclaiming the right to

control his actions; we are here in response to the orders of this Court, in obeyance to the Court [14] and to await the further orders of the Court, with which we are prepared to comply. The prisoner is not in our custody; he is here in court in the custody of the marshal. Now, if Mr. Richey's contentions be correct, that most and greatest extent to which it can go is that at 2 o'clock this afternoon the bail who went on the bond before the Commissioner may possibly be held to be liable on that bond—which is a matter which does not concern this Court in the slightest respect. This Court is prepared to deal only with the present custody of the prisoner and with the pleadings before it. If, as I have stated, in securing the prisoner before this Court, the bondsmen or their counsel have done anything which will subject the bondsmen to a pecuniary liability on the bond which they gave before the Commissioner, that is a matter with which this Court has no concern, and in which, I take it, it has no interest. When 2 o'clock this afternoon comes, we will appear before the Commissioner in order to show that there has been no disregard for the Commissioner's alleged jurisdiction; we will show the Court that the prisoner has been discharged from his custody this morning in this proceeding or else he is still held under the process of this Court, which will supersede the process [15] of that Court. His jurisdiction certainly cannot be more extensive than the jurisdiction of this Court, and I think it is quite clear that whatever—

The COURT.—The only question is whether the

surrender to the marshal, unaccompanied by the other formalities mentioned in Section 1018, was effectual in the surrender of the applicant here to the marshal so that he was in the actual custody of the marshal at the time the writ issued. I take it that this is jurisdictional. The writ cannot issue until and unless there be a real intention.

Mr. SEABURY.—If your Honor will hear me for a moment upon another point, there is another aspect I would like to contend for. We respectfully contend that Section 1018 of the United States Revised Statutes is wholly inapplicable to the present case—it has no application whatever to this situation, for the reason that that section relates only to a person charged with a criminal offense. I have an authority here in the form of an opinion rendered in the Ninth Circuit Court of Appeals which holds flatly that the proceeding is of a civil nature; that there is no affirmative statute in the United States authorizing the admission to bail in such cases, and that the admission to bail rests entirely with the [16] discretion of the Court; so that it seems clear to me that the section is wholly inapplicable to the present proceeding.

The COURT.—Is there any statute that is applicable?

Mr. SEABURY.—No, your Honor; but the implication contained in the Chinese exclusion acts is to the effect that the Court has the right to admit to bail. Now, the case I was looking for is contained in 187 Federal. Now, the case came before Judge Gilbert, as I recall the facts, upon an application

for bail after there had been an order of deportation granted by the commissioner, and the application was upon *habeas corpus*, and the Court said that it had the right to admit to bail. (Cases cited from 187 Federal and 132 Federal.) In this case, the lower Court declined to admit to bail; in consequence of which the ruling of the trial court was affirmed, and the ruling was in line with all of the recent authorities, and was to the effect that the admission to bail was in the Court's discretion; and that was based entirely upon the reasoning that proceedings under the exclusion act were not of a criminal character, and, under our statutes, Section 1018 necessarily has nothing to do with the proceeding. [17] We claim that we had a right to surrender to the marshal this prisoner, and it was the duty of the marshal to take him into possession, and he was solely responsible for his custody and production before any Court.

Mr. KENT.—When, your Honor, I was on the bench, the question was before the Supreme Court of the Territory, the rights to admit to bail, and the Supreme Court held in that case that it was a discretionary right. Following the decisions cited by Mr. Seabury, it resolves itself into this: This, being not a criminal case, the criminal statutes of the United States do not apply, but the bail may surrender the person in their custody just as they may in any civil case just by taking him to the officer. A man under arrest in a civil process may be surrendered to the sheriff without application to any Court when the bail have reason to believe that he

may no longer remain in their custody. Therefore, in this instance, we had the absolute right and the bail had the right to surrender this man to the marshal for whatever reasons they may have had. Mr. Seabury suggested a case—in the case of Jim Hong, 187 Federal, decided in the Circuit Court of Appeals, Ninth Circuit—which is direct in point. The [18] general provisions in regard to bail in criminal cases do not apply, as deportation cases are not criminal in their character. (Cases cited in 149 and 163 Federal.)

Mr. RICHEY.—There is no contention, your Honor, that the bail have not the right to surrender their charge at any time, but it is contended that, if they do surrender him, they must surrender him by a rule which is reasonably applicable. Now, it is contended by the counsel that there is no specific provision in regard to these matters and it is discretionary with the Court. If that is a fact, and the Court does assume the right and the power, it should be governed by the laws which would, under the specific provisions, govern in the matter of bail. Now, the Court has evidently stated that the rules in criminal cases shall not apply, but I think the Court intended that that ruling should apply as a matter of right or a matter of course, but the Chinese cases are quasi-criminal cases; they are tried according to rules of civil procedure, but the whole action against Chinese persons charged with being unlawfully within the United States is criminal in its nature; he is arrested, taken into custody, and permitted to go upon bail for his appearance; it is [19]

criminal in its nature; it is criminal to a certain extent, and that part of the proceeding and the rules governing and fully governing a like procedure are naturally and reasonably those rules governing like procedure in specific criminal matters; it would be reasonable and proper to apply those rules in the disposition of bail matters in alien cases—in Chinese exclusion cases. The complaint is laid, the warrant of arrest is issued, the defendant is arrested, taken before the Commissioner, his trial set and he is ordered admitted to bail, the bail is furnished, and he is enlarged on it; and the whole matter is criminal in its nature, criminal in its procedure; and the counsel states that he was delivered to the custody from whence he was taken upon bail. Now, that is not a fact. He was arrested and taken and delivered into court and was never delivered into the hands of the United States marshal. He was in the possession of the Court and not in the custody of the marshal until he was remanded and ordered into his custody; and in this instance, the warrant was returned and he was delivered into the custody of the Commissioner; and, as an officer of that court, of course, the marshal stood there, and, without ever being committed to the custody of the United [20] States marshal, he was enlarged upon bail, and the Court was the custodian at the time he was enlarged upon bail and not the United States marshal.

The COURT.—No; I should not think that the Court was the custodian. It might be that the order of the Court was necessary in order to vest the right of the detention in the marshal, but in a crim-

inal case the Court is never the custodian. The custody is used in that narrower sense that the actual detention, physical detention, which is the basis for the writ of *habeas corpus*—that is to say, that no writ of *habeas corpus* would lie against the Court; and I should say that I know of no instance where the Court is deemed the custodian of a defendant in a sense that a writ would lie against it.

Mr. RICHEY.—It is well established, and has been stated by Courts without end, that Chinese exclusion cases are quasi-criminal cases and are conducted according to the rules of civil trials, but that they are not entirely civil proceedings, that they are not governed entirely by the rules of civil procedure—it is merely a disposal of the right that is disposed of by the civil procedure.

The COURT.—What is the procedure at common law for the surrender of bail?

[21] Mr. RICHEY.—I am not prepared to state, and where there is a statute and a rule and no provision made, I would think that the Court would be governed by whatever statute there was.

The COURT.—Yes; it applies. I should say that this applies only by analogy.

Mr. RICHEY.—Yes; that is how I take it. That is the most reasonably applicable provision that we have governing such a provision, and having that, and that being our law, and we being used to that procedure, it seems to me that that would be what would be required.

Mr. KENT.—The difficulty is that the United States Circuit Court for this circuit does not agree

with Mr. Richey. The general statutory provision in regard to bail for a criminal case does not apply to deportation cases—they are not criminal in their nature. Your Honor would have to hold here that, in a case which is not criminal, that is where the criminal statutes do not apply, in order to surrender the person in their custody, that they have to follow the provision of a criminal statute; and there is no warrant for saying that they must go before the Court to surrender pursuant to provisions of this statute unless it is a criminal case. The [22] United States Supreme Court says it is not a criminal case, and the statutory provisions in regard to bail do not apply, and you are asked in this case to say that they do apply and the surrender was not legal. Now, your Honor is well aware that the surrender of bail—

The COURT.—Is that the method at common law?

Mr. KENT.—Yes; as far as I know. Without statute, how could it be otherwise? The bail, being apprehensive that he may disappear, he goes to the officer and says that he will no longer be responsible and to take him back. The officer then becomes the custodian. (Cases cited from 187 Federal and 190 Federal.)

The COURT.—I think under that decision it is a common-law procedure—it is a common-law right.

Mr. KENT.—Therefore, this procedure does apply.

The COURT.—But I am curious to know what the procedure at common law was.

Mr. KENT.—I don't know, your Honor; except

we know it is a matter of practice to surrender to the sheriff.

The COURT.—I am sure the Court does not know.

Mr. KENT.—I know the statute does not apply.

[23] Mr. RICHEY.—I disagree with the Court as to the matter of practice of delivering to the marshal.

The COURT.—Common law?

Mr. RICHEY.—Under State or federal, it requires a certain procedure.

The COURT.—That is a matter usually determined by the statute.

Mr. RICHEY.—Yes, sir.

The COURT.—But this is not a statutory bail.

Mr. RICHEY.—No; I am simply making my contention that that would be the practice.

The COURT.—Not necessarily so; if the statute does not apply, that might be governed properly by a ruling of the Court following the analogy of the criminal practice, as provided by statute, but in the absence of any ruling of Court, I am somewhat in doubt as to what should be—

Mr. KENT.—May I suggest, your Honor, that the contention of the United States Attorney that the statute does apply and that bail had not been surrendered on account of this statute—

Mr. RICHEY.—I think Judge Kent misunderstands me. My contention is that it should be made applicable because of its uses in our practice, it being our only statute governing the question of bail.

[24] The COURT.—That is a matter of discre-

tion—this matter should arise properly when the writ issues. After the writ issues, the Court could hardly dismiss it because a better practice could be resorted to. It is a matter to be governed entirely by a ruling of Court, and I am inclined to think that there is jurisdiction here, and we may proceed on that theory, and you may amend your return by two o'clock if you wish.

Mr. RICHEY.—Yes, your Honor.

The COURT.—Adjourned until two o'clock.

Mr. SEABURY.—May I ask what disposition may be made of the prisoner in the meantime?

Mr. RICHEY.—The marshal refuses to take the custody of him without your Honor's orders.

The COURT.—The marshal may take the custody of the prisoner and bring him back this afternoon.

#### [Exception.]

Mr. RICHEY.—Before filing the return, we desire to except to the ruling.

#### [Proceedings Had After Amendment of Return to Writ, etc.]

Mr. SEABURY.—If your Honor please, in response to the amended return to the writ, we desire to file with the Clerk the demurrer of the defendant to the return, which is as follows:

(The demurrer to the amended return to the writ [25] is read by Mr. Seabury.)

#### [Motion for Judgment Discharging Defendant from Custody, etc.]

Mr. SEABURY.—In addition to that, if your Honor please, I desire to move at this time for judg-

ment discharging the defendant from custody upon the pleadings before the Court, and, as to that, I would like to be heard. We have here, if your Honor please, a petition which has not been fully read in the proceedings. There is considerable detail stated in the petition. It is not the usual petition which simply says that a man is restrained of his liberty by certain process, but it has gone into the matter very fully. It states certain facts. It is the purpose of the writ to show by what process this defendant is held, from which the Court will be obliged to determine whether or not it is due process and whether or not he be properly held at the time of the issuance of the writ. This return does nothing more than state the facts which were admitted in court this morning, which deal with the Court's jurisdiction at this time.

Mr. RICHEY.—This is just the reason why the United States desired to intervene and state their cause and join issues with the petition.

Mr. SEABURY.—The United States is before the Court now in the person of the marshal, and his [26] attorney is the United States Attorney for the District.

The COURT.—I don't know of any intervention in *habeas corpus* cases.

Mr. RICHEY.—I know of none, but I know of no reason why the Government should not answer the petition through the United States Attorney.

The COURT.—It usually does through the marshal.

Mr. RICHEY.—The marshal may know nothing of these facts.

The COURT.—The return of the marshal will show by what authority he holds him. If it be by warrant of arrest, he produces his warrant of arrest and order of detention, and he presents his order of detention.

[Motion for Leave to Further Amend Answer, etc.]

Mr. RICHEY.—We ask at this time, if the Court please, to permit the United States marshal to further amend his answer, with the changes which will be necessary in substituting the United States marshal for the intervener, and, as soon as I can get around to it with sufficient time, I will make that amendment in this proceeding.

Mr. SEABURY.—We are, of course, surprised by the allegations of fact contained in the new petition [27] which we have never seen.

The COURT.—I will permit the return to be amended if the return to the writ is insufficient and if you wish to put in your amended return the facts as to his detention.

Mr. RICHEY.—I do, your Honor, and as soon as I can get the time, I will substitute the marshal for the intervener named herein.

Mr. SEABURY.—In the meantime, if your Honor please, we desire, if allegations of fact are contained in it, to be permitted to examine the new proposed pleading, if your Honor will give me a few moments to confer with Judge Kent on the subject.

Mr. KENT.—I understand the United States Attorney wants to make, as a return to the writ, that

the United States marshal makes the following return and then have the petition as it goes.

Mr. RICHEY.—Yes; except I wish to substitute the marshal for the intervener.

Mr. KENT.—We might wish to demur, and want to have it understood, and if the United States Attorney would style his caption—

Mr. RICHEY.—As a further amended return of the United States marshal.

Mr. SEABURY.—To take the place of the two [28] former returns?

Mr. RICHEY.—In addition.

The COURT.—I understand you style that as an additional return.

Mr. SEABURY.—This will be a second amended return?

Mr. RICHEY.—This will be filed with it—simply attached to it, with the Court's permission, because there is no return on this unless I make an exact copy.

The COURT.—This is an amended return?

Mr. SEABURY.—This is a separate return, as I understand it.

Mr. KENT.—Might it state that it is a part of the second amended return of C. A. Overlock, United States Marshal, to the writ of *habeas corpus* hereto annexed, and that the facts set forth in the first amended return are hereby incorporated in full?

Mr. RICHEY.—I will state that I will fix it any way that will be satisfactory to you as to the manner of identification.

Mr. SEABURY.—May we be accorded the privi-

lege of reading the proposed return so that we may determine whether we will traverse or demur?

(Intermission.)

[**Motion That Demurrer to First, Stand as Demurrer to Second, Amended Return, and Motion for Judgment on Pleadings, etc.]**

[29] Mr. SEABURY.—If your Honor please, we have examined, with as much care as possible during the brief interval, the second amended return of the Government in this proceeding. We move that our demurrer to the first amended return be permitted to stand and be read as a demurrer to the second amended return; and we hereby demur to this second amended return, and move again for judgment on the pleadings as they now stand, praying the discharge of the prisoner.

[**Argument on Demurrer to Second Amended Return, etc.]**

Now, in support of that motion, if the Court please, I would like to direct the Court's attention to a consideration of the pleadings. We have alleged in substance that the petitioner, the defendant here, is a person of Chinese descent; that he is lawfully within the United States; that he has never departed therefrom since given his certificate. He states that he has a certificate, given a certain number; the answer admits that he has a certificate described in the petition, and that the certificate is a certificate of residence—of his right to be in the United States.

Mr. KENT.—Mr. Richey, may we have the certificate a minute?

(Mr. Richey hands the certificate to Mr. Kent.)

Mr. SEABURY.—This certificate, if your Honor [30] please, so far as we have been able to gather—we have only seen it twice very hastily—is a certificate granted under the Act of 1893, which amended the Act of 1892, and is the type of a certificate, as we understand it, which is known as a “certificate of residence and identification.” We claim for it a peculiarly strong position in that respect, because, under the authority, it differs from the other certificates. This is a certificate which was granted after a complete investigation by the officers granting it, and is conclusive in its character. Now, there are no substantial allegations in this return, if your Honor please—there are only conclusions that he is not a person lawfully within the United States. It admits the granting of the certificate. It does not set up any of the facts at all, but is again an attack upon the jurisdiction of this Court—a renewal of the claim of this morning that this Court has no jurisdiction to entertain this *habeas corpus* because of the pendency of the proceedings before Commissioner Johnstone. It attempts to demur to the petition, and says that, even if everything in the petition were true, he would not be entitled lawfully to be and remain in the United States. We are in this country under and by virtue of that [31] certificate, and under the authorities that certificate is conclusive evidence of our right to remain. Now, the office of this writ, as we have said this morning, is to show the cause of detention. We attached copies of the warrant and complaint to our petition, all of which

is admitted to be correct in this return. Now, the warrant was this:

[Warrant.]

"Complaint on oath having been this day made before me, a United States Commissioner for the District of the State of Arizona, that the offense of being a Chinese person unlawfully within the United States has been committed and accusing Jim Hong thereof:

"You are, therefore, commanded by the President of the United States forthwith to arrest the above-named Jim Hong and bring him before me forthwith at my office, in the District of Arizona, or in case of my absence, or inability to act, before the nearest and most accessible Commissioner within this District."

Now, the complaint, which was the basis for that warrant, was this:

[Complaint.]

"O. T. Richey, being duly sworn, on behalf of the United States deposes and says that he is a duly appointed, qualified and acting [32] Assistant United States Attorney, that Jim Hong is a Chinese person not lawfully entitled to be or to remain in the United States, and that the said Jim Hong is now in the District of Arizona, and within the County of Maricopa thereof; wherefore affiant prays that a warrant be issued for the arrest of the said Jim Hong that he may be dealt with in accordance with law."

This leaves the accused to ascertain as best he may when he is confronted for the first time by a witness

who accused him of being illegally here, of what the illegality consists; whether he fraudulently secured the certificate in the first instance; whether it was induced to be issued to him by a fraudulent misrepresentation; or whether he had departed from the United States in violation of certain provisions of the statutes; or whether he remained absent; or whatever he may have done; or whether he may have committed a crime. We are left in ignorance in regard to it, and we stand upon the admission contained in the answer that it is true that we had this certificate; the officers of the Government took it from us—seized it from the accused; and their assertion of a right to hold that certification, in violation of the rights of the accused, shows clearly [33] an admission that we at least obtained the certificate properly; and they set up no facts which show or tend to show any facts from which it can be inferred that we have surrendered that right; and, on the pleadings for that reason, we move for judgment dismissing and discharging the petitioner. Before your Honor rules upon it, we would like to direct your Honor's attention to 176 Federal, which was decided in March, 1910, in the Circuit Court of Appeals in the Fifth Circuit. (Case cited from 176 Federal.) In that respect, it is identical with this case here. Now, we have a return which sets up that he was arrested; that they had a right to arrest him; that they had a proceeding pending before Commissioner Johnstone for his removal. In that proceeding we would have a right to address the Court and determine, asserting no facts at all, what

we have done which constitutes an illegal presence in the United States. The Circuit Court examined the matter and found insufficiency of the return to justify the detention of the prisoner and discharged him. That authority, if your Honor please, does nothing more than exemplify the perfectly well settled rules applicable to *habeas corpus* cases. The petition for the writ should contain a plain [34] statement of the facts; it should set out what the cause of detention is in this case, the order of arrest and complaint. The return, on the other hand, should come in and disclose the cause of detention; it should produce the process under which the man is held in order that the Court before whom the writ is heard can determine the lawfulness or legality of his detention. If the return shows such facts, the petitioner has one of two remedies left. If the Court determines such facts or course of procedure, he may either demur to the return on the ground that the facts stated do not constitute a ground for the detention of the defendant; or, if there be questions of fact raised, it is his privilege to traverse; but, in the absence of traversing of allegations of fact, the statements given in the return are to be found in favor of the Government and against the petitioner. That is the purpose of the traverse: to put those in issue, and leave them before the Court where the allegations of the petitions may be believed to be true. Now, as I have said, there are only conclusions of law in the return. We are not required to traverse, as a fact, conclusions of law; and conclusions of law, even in themselves, are wholly

insufficient to justify any detention [35] of this man. In the face of the allegations contained in the petition, and from the affirmative showing which is made here by the production of the certificate, it is complete identification. By its admission to be the certificate, as stated in the petition, and also under the return, and under the authorities, we ask for the discharge of the prisoner, under the pleadings. We are here now upon a second amended return. We think that every opportunity has been accorded to the Government to show the cause of detention if it was other than we allege it to be, which it is not, and we respectfully contend that upon the process stated by us, and admitted to be the process under which he is held, is not sufficient ground for his detention, and we, therefore, ask for his discharge.

Mr. KENT.—I want to supplement. What is the truth here, if your Honor please? We have set up in our petition that this man is lawfully here under a certificate of residence, and that he has been arrested and is in the custody of the marshal and deliberately restrained of his liberty, and by writ of *habeas corpus* ask for his discharge; they set up and say that he has a certificate, thereby admitting that he was here lawfully. They then put in an [36] allegation of law and say that he was here unlawfully; that there was another proceeding pending before the Commission to deport him. Now, the return to the writ of *habeas corpus* must show the ground of detention—not to say that he is here unlawfully—particularly when they admit in their return that he

has a certificate to show his right to be here. Unless they come in and show something which shows a showing which contravenes the law, under that certificate there is nothing to try. Suppose your Honor should deny this motion, should overrule the demur-  
rer, what do we try. There is no issue whatever raised by the return; they cannot come forward and produce any evidence of illegality of being here, be-  
cause there is nothing to support it. We, on the contrary, have shown by our pleadings and they ad-  
mit his right to remain here under that certificate. Clearly on the pleadings—clearly there is nothing your Honor can do but dismiss him.

Mr. RICHEY.—If your Honor please, the Chinese law, in Section 3, Act of May 5th, 1892, an act to prohibit the coming of Chinese persons into the United States, now in force, states that “any Chinese person or person of Chinese descent arrested under the provisions of this act,” etc. The only charges [37] that the United States has to make is to charge that he is here unlawfully—and all the charge that is necessary is that he is here unlawfully—do not need to sign a complaint—take him before a Commissioner without any papers at all and state that he is here unlawfully.

The COURT.—Suppose he produces a certificate?

Mr. RICHEY.—It is up to the United States to controvert it. The United States has never been given an opportunity to controvert it. The trial has not been had.

The COURT.—This is a *habeas corpus* matter, and

it is your duty and you must show by what authority he is detained.

Mr. RICHEY.—But, if your Honor please, it should be done before the Commissioner.

The COURT.—There is nothing in that contention that the District Court of the United States cannot inquire into the question of a detention on *habeas corpus*. Then, if it does and the court has jurisdiction and the question is raised, it is for the Government to show the cause of his detention, and the cause of his detention is that he is here without a certificate or that he is a Chinese person, a laborer, here without a certificate.

[38] Mr. RICHEY.—That is our contention; and it being his duty to show by affirmative proof his right to remain here, and there being an appeal from that Court, this Court will not look into those matters.

The COURT.—This is just the purpose of the writ of *habeas corpus*. That is just the purpose of it—exactly so. The purpose is not anything more than to require the United States in this form of proceeding to show affirmatively—I take it that the very distinction between the two cases is what led to the bringing of this matter rather than by the ordinary procedure before the Commissioner to determine it. It is the right of that man to appeal to this Court, and we have no business to deny a writ of *habeas corpus* when presented. When presented it is the business of the Government to come in with its showing. It makes no difference what we think of it—of the propriety of it—it is the duty thrust

upon us, and we must comply with that duty. Now, here we are: it is a writ of *habeas corpus*, and if the Government wants to present what it has in the way of a showing why this man should be detained, it ought to be produced so that we can inquire into it. We have the jurisdiction. It is our duty to hear it. That jurisdiction being invoked, [39] we cannot evade it.

Mr. RICHEY.—Do I understand this Court that this Court can take the trial away from the Commissioner?

The COURT.—Of course it can—from the Justices of the Peace or Commissioners.

Mr. RICHEY.—And have a trial here in the first instance instead of there?

The COURT.—If it turns upon questions of fact or probable cause, the Court may take the view of it that we should, or the United States Commissioner of the Justices of the Peace, as the case may be; but, having invoked the jurisdiction of this Court, we must go ahead and try the case as we would any other *habeas corpus*. The fact that the man is a Chinaman does not make any difference.

Mr. RICHEY.—No, your Honor, that is appreciated. The contention is that the *habeas corpus* is not to fulfill the function of an appeal or writ of error; and the jurisdiction of the United States Commissioner is not affected by the positive averments in the complaint. The *habeas corpus* will not bring into review errors or irregularities, whether relative to substantive rights or law of procedure of the court with jurisdiction; and the remedy is

by appeal, [40] exception or writ of error; and we contend that, if the Commissioner has jurisdiction to try this matter, this Court will not interfere with it.

The COURT.—Suppose you have arbitrarily arrested this man and are holding him arbitrarily, this Court must inquire into that. We are not passing upon the sufficiency of your showing, but we are inquiring into the necessity of the Government of making some showing to justify the arrest and detention of this man. Otherwise, we must discharge him.

Mr. RICHEY.—The Government is willing to meet any showing of the defendant's right to be here, which he is affirmatively required to make.

The COURT.—The Court does not criticise counsel as to the position he takes—only this: there is one thing to do: either proceed as in any other case of *habeas corpus* by the presentation of proof, or any showing you may make, or to grant the writ upon the theory that the Government has failed to present anything justifying the detention of the prisoner.

Mr. RICHEY.—Does your Honor hold that, if the defendant presents his petition here, you will require the Government to introduce the same matter it would introduce before the Commissioner; that is, evidence [41] of its claim of this man's—

The COURT.—Understand, this Court knows nothing about your trial before the Commissioner.

Mr. RICHEY.—But the petitioner has stated that.

The COURT.—Possibly so; but he has not stated

anything but his right to remain in the country. There is nothing to show other than the facts set up in the petition, which would show that this Chinaman is unlawfully within the country. It is the duty of the Government to show that here in this case. If the petition shows an unlawful detention—

Mr. RICHEY.—Our contention is that the petition does not show an unlawful detention; that the petition is not full; that it does not state all of the facts; and that the return of the marshal sets out the facts that are not contained in the petition.

The COURT.—Does it show enough to show a lawful detention?

Mr. RICHEY.—It shows, under our contention, that it is a lawful detention, because that matter that the petition leaves out is the steps between the time of arrest and the right of the marshal to hold this defendant. They do not recite any bond in their petition, or any bail to connect the full chain [42] between the time of his arrest and the time that the bail turned him over.

The COURT.—That is raising the other question.

Mr. RICHEY.—I don't mean it that way, your Honor, but just to show that it is not a detention under the warrant but a detention under the delivery and surrender of the bail.

The COURT.—The Government may do one thing: they may stand upon the question of custody of the defendant at the time this application was made. That is all right. The Court will pass upon that. If you do not stand upon that, then, of course, you will have to stand upon the other ques-

tion as to whether the petition makes out a *prima facie* case showing unlawful detention—detention in the absence of any showing by the Government which would contravene the allegations of the petition.

Mr. RICHEY.—Well, I don't know that there will be any contravention of the allegations of fact set forth in the petition, but it will contravene the contentions of the rights of the defendant as to his being illegally restrained of his liberty. It would show that the petition—and the return made, as proposed and as will be made, will show your Honor, if you please, that this defendant was arrested last [43] November; that immediately upon his arrest he was taken before the United States Commissioner and then he pleaded not guilty; that the trial was immediately set; and that he was immediately released upon bail and was not committed to jail pending trial; that either two or three continuances were granted at the request of the defendant for this trial; and that the United States has been ready at all times to try the case. The complaint does state only in substance that the defendant is a person of Chinese descent unlawfully within the United States. Now, when he presents his certificate that he has a right to be here, that is *prima facie*. Then it is up to the Government to introduce any evidence they may have, but up to that time the Government does not disclose and is not required to disclose, and is not required to plead upon what basis it contests the defendant's right to be here.

The COURT.—Are you speaking now of the writ

of *habeas corpus* or the procedure before the Commissioner?

Mr. RICHEY.—To both, your Honor, because the writ of *habeas corpus*—

The COURT.—I have no exception to the general rule—I know of no exception to the rule of procedure [44] in *habeas corpus* cases. The person who has the detention of the petitioner, after the petition makes out a case of unlawful detention, must come in and show the authority by which he is held.

Mr. RICHEY.—I am just endeavoring to get to that, your Honor. The petition alleges the warrant of arrest and all up to the delivery of the prisoner to the deputy United States marshal by his bail. They do not disclose that—

The COURT.—That is mere procedure. That is not the essentials of this thing. Why did he give bail in the first instance?

Mr. RICHEY.—The complaint and warrant as set forth in the petitioner's complaint—and that is what the United States bases its contention on that the Commissioner has jurisdiction, and begs to show this Court that, upon the pleadings of the petitioner himself, the Commissioner had jurisdiction—the Commissioner, having jurisdiction over the matter of the disposition of the charge, this Court will remand him to answer to that—that is the contention of the Government that the petition should be dismissed.

**[Motion for Judgment Discharging Prisoner  
(Renewed).]**

Mr. KENT.—We renew our motion, if your Honor please, that under the pleadings it is admitted that the certificate belongs to this man; the certificate [45] was duly issued to him by the Government and nothing in the return contravenes his right to be here; and, under the pleadings, we ask for judgment discharging the prisoner.

Mr. RICHEY.—We protest.

The COURT.—I have not read the return carefully. Does it state any facts?

Mr. KENT.—No, your Honor; except that it states the fact that the certificate was given to him; states facts in regard to the arrest; and also states that he has never been legally within the custody of the marshal since that time—states no facts to justify his arrest.

The COURT.—You think the mere fact that the pendency of these proceedings before the Commissioner—the fact that a complaint has been filed is not in itself a sufficient return to justify—

Mr. KENT.—This entirely supersedes that. Suppose that he has been taken off the streets—

The COURT.—You think the case is analogous to a case where a man is arrested by a warrant by a Justice of the Peace, charging him with the commission of a crime and a writ of *habeas corpus* is asked for and granted? What would the return show?

Mr. KENT.—Must show the grounds upon which he [46] is held.

The COURT.—He may justify it by showing lawful warrant of arrest issued upon a lawful complaint before a magistrate.

Mr. KENT.—But there is nothing else that your Honor can do here but grant this motion we make, or else this Court has no obligation to entertain—

The COURT.—It is a question with me whether I ought to go into the facts as to whether this procedure is not sufficient to justify the detention.

Mr. KENT.—There is nothing in the return setting up anything to inquire into.

The COURT.—The return does set forth the procedure before the United States Commissioner.

Mr. RICHEY.—Yes, your Honor.

Mr. SEABURY.—I think, if your Honor please, the difficulty with that is that the Commissioner in the first place is nothing but the officer of this court as a subordinate quasi-judicial officer.

The COURT.—I don't think that makes any difference, Mr. Seabury. The law clothes the Commissioner with certain power. It is an original jurisdiction conferred upon him, and within the scope of that authority the Commissioner is as much authorized to proceed as this Court or any other Court.

[47] Mr. SEABURY.—That is true. I did not mean to embark upon an argument to show that the Commissioner, because it was a court of inferior jurisdiction, it would not have authority; but the situation is this: they present a complaint before Commissioner which only says, as a conclusion of law, that the man is unlawfully within the United States; we apply to the Court for a writ of *habeas corpus*, which

writ is granted. As your Honor says, the Government must produce the cause of his detention; it contends that he is held by virtue of that warrant, and upon inspection of the warrant and complaint upon which it is based, it appears that he is only charged with that conclusion of law; and upon the return of the writ, we called for the production of the certificate, which was produced; and that certificate is admitted to have been taken under the admission of their return here—seized by the inspector and retained by him, who claimed authority to do so. Now, that certificate is conclusive evidence of his right to be here, and the moment that is introduced—more than that, your Honor please, this particular type of certificate is not open to collateral attack in the proceedings. Suppose that they undertake to prove that this certificate was obtained from the [48] inspector who granted it by fraud, the Courts hold flat-footed that the Commissioner has no jurisdiction over any such inquiry, and, upon proof of it, the man is entitled to his discharge. (Case cited from 149 Federal.)

The COURT.—What form of certificate?

Mr. SEABURY.—This is a certificate exactly like ours, I take it, issued under the Act of 1892, amended by the Act of 1893. In other words, that is just the point. This is not the ordinary certificate of a man's right to come into this country, and this man, as appears by the petition, was in this country for approximately twenty or thirty years, as I recall the facts. He sets up that he has been here since about sixteen years of age; and that he lawfully came through the

port of San Francisco, and stayed with his father; and his father was lawfully here under a merchant's certificate, and went back to China; and that, thereafter, he came again into the country and engaged as a merchant in some part of Texas as a member of the firm, and not engaged in manual labor or anything of the kind; and that, thereafter, he engaged in the restaurant business; [49] and that about that time, 1894, the certificate was issued to him under the Act of 1892 as amended under the Act of 1893. Now, in a case that was before the Ninth Circuit Court of Appeals, in 184 Federal, in which Judge Gilbert wrote the opinion, this comment was made: (Case cited from 184 Federal.) So that we offer these authorities, if your Honor please, with whatever qualifications are contained in other portions of them of which we are aware and of which we have no desire to deprive the Court of information concerning them. I take it that they are conclusive authority upon the question of that man's right to remain in the country in the absence of a showing by the Government in a direct attack upon it. So that, in the exercise of your Honor's discretion, you will entertain this writ, and thereupon it does not matter what happened to the bail or anything about it. Granting that the man was in the physical possession of the marshal at the time the writ was granted, and there being no response to the writ, we are clearly entitled to a discharge on the pleadings.

Mr. RICHEY.—The case there refers to a collateral attack only upon the certificate. As to its being conclusive—as to that, we admit, your Honor—we

do not contend as to that, but what it is [50] conclusive so far as its issuance and its coming from the people who first gave it, and it is exempt from collateral attack.

Mr. SEABURY.—This is a collateral attack.

Mr. RICHEY.—We do not deny that. The return of the marshal denies nearly everything set forth in the petition and pleads that it is immaterial, irrelevant and incompetent for any purpose in this *habeas corpus* proceeding.

The COURT.—What is your theory about what issue could be raised in this proceeding?

Mr. RICHEY.—I have a memorandum here with a good many authorities, and the memorandum that I have here is short. *Habeas corpus* is intended solely to free one from an illegal restraint, and it is not to fulfill the functions of an appeal or a writ of error; the jurisdiction of the United States Commissioner is not affected by defects in the positive averments in the complaint, and *habeas corpus* will not bring into review errors or irregularities whether relative to substantive rights or law of procedure. The remedy is by appeal, exception or writ of error.

The COURT.—But do you not think that the writ of *habeas corpus* may be invoked pending determination by the United States Commissioner?

[51] Mr. RICHEY.—If your Honor please, only this: to inquire whether or not the Court trying the matter has the jurisdiction to try it; if the Court has jurisdiction to try it, and jurisdiction over the subject matter, the Court appealed to for *habeas corpus* proceedings will dismiss the proceedings and

remand to the Court to be tried.

The COURT.—That is not the general rule.

Mr. RICHEY.—That is the rule except in extraordinary circumstances.

The COURT.—Every case of this kind is extraordinary in the theory of the man who brings it.

Mr. RICHEY.—Even where some right under the federal Constitution is involved; it is better to leave the prisoner to his remedy by direct proceedings. If *habeas corpus* is denied, then there is a remedy open to the petitioner other than appeal even. If it appear that jurisdiction has not been exceeded and the proceeding is regular on its face, the prisoner will be remanded.

The COURT.—Those proceedings are sound.

Mr. RICHEY.—As to aliens, it is only as to whether jurisdiction has been exceeded.

The COURT.—I presume that an examination of those cases—

[52] Mr. RICHEY.—The return challenges jurisdiction only.

The COURT.—That some order has been entered—

Mr. RICHEY.—Our contention is—

The COURT.—That is a very different case from this where there has been no adjudication at all in regard to the case.

Mr. RICHEY.—If it is shown to the Court, especially if it is shown in the petitioner's pleadings that the complaint is sufficient, as shown by the pleadings of the petitioner without evidence—if the complaint and warrant are sufficient, your Honor, my

understanding of the law is that this Court will immediately remand him to be disposed of.

The COURT.—I don't understand that to be the procedure at all, where there has been no adjudication or finding of fact by the Court.

Mr. RICHEY.—If this were a judgment, your Honor, I would then concede that the Court would have a right to go behind and make an assignment of facts.

The COURT.—That is where I differ. The Court ought to do it—but where there is no adjudication or finding—here he is a man under arrest; it does not matter whether he is a Chinaman or not. He has had no preliminary examination. Suppose he [53] sets up that his arrest was absolutely without warrant of law, without justification, no crime has been committed—may he not invoke the writ of *habeas corpus* and have the matter tried? Certainly. It is the very purpose of it.

Mr. RICHEY.—Not unless he is given an opportunity to come to trial.

The COURT.—Counsel goes too far as to that.

Mr. RICHEY.—We resist the motion.

Mr. KENT.—We ask the Court to grant the motion on the record. I don't see that the Court can do anything else but grant the motion.

The COURT.—Well, I should like to have the matter thoroughly gone into. If there is any real cause for his arrest and detention, I should like to have an opportunity to pass upon it, but I am afraid under the return that there is nothing to go into except the examination of the certificate. It seems to disclose

*prima facie* his right to remain. That is enough to place the burden on the United States.

Mr. RICHEY.—If the Court please—if the Court hold that with the showing here we have to produce evidence the same as we would have to introduce, it puts the matter up in the same position that if at the time of trial the prisoner should go before [54] the Commissioner and present his certificate, and we would produce our evidence if we had any. Now, if the Court is going to require—I mean if the Court is going to hold that he will discharge this prisoner on the petition if we do not controvert the claim he makes in the petition—

The COURT.—Of course, the Court does not say that—it says that I am afraid from the return as made here, there is no sufficient cause shown for his detention.

Mr. RICHEY.—I take it that your Honor rules that the complaint is insufficient.

Mr. SEABURY.—The petitioner sets it up himself.

The COURT.—Let me see the complaint.

Mr. RICHEY.—It is our contention, your Honor, that is, you discharge him on the petition, you determine that the Commissioner had not jurisdiction.

The COURT.—This complaint only states a matter of conclusion of law.

Mr. RICHEY.—Suppose we don't make a complaint—just take him before the Commissioner. That would be the same thing.

The COURT.—Yes.

Mr. RICHEY.—Then we would be compelled to [55] produce his certificate.

The COURT.—Suppose he has produced his certificate?

Mr. RICHEY.—Then the United States is compelled to produce its evidence.

The COURT.—When the certificate is exhibited, that establishes a *prima facie* right.

Mr. RICHEY.—Yes, your Honor, and I ask now whether your Honor is going to take cognizance of that certificate in this proceeding to such an extent as to compel an introduction of evidence if we desire to controvert this proceeding. If you produce this before the Commissioner, that is sufficient for the Commissioner to discharge him unless we show proper evidence to the contrary.

Mr. KENT.—This motion ought to passed upon, and Mr. Richey ought not to be talking back and forth. The pleadings are insufficient, and I ask for a discharge of the prisoner.

Mr. RICHEY.—I am endeavoring to see what position we are in.

Mr. SEABURY.—The motion—

The COURT.—It is for counsel to say. It is, of course, improper for the Court to indicate what the counsel ought to do.

[56] Mr. RICHEY.—I want to know what position the Court assumes, and then I will be able to know what we will be required to do.

The COURT.—The question before the Court, Mr. Richey, is not one of fact. It is one of law: whether the pleadings as are now presented—and by the

pleadings I mean the petition filed by the petitioner for the writ, and the returns as made by the marshal—show *prima facie* that this man is entitled to his discharge. They show that this man has a certificate, and there is no other reason given why that certificate should not be accorded the effect which certificates under the law are intended to be given. That is the right of a Chinaman to remain in this country. Whether this certificate is conclusive evidence or only *prima facie* evidence—is there any fact here set up by the marshal in his return to show that he is unlawfully within this country, notwithstanding his possession of this certificate, and I do not take it that there is.

Mr. RICHEY.—No, your Honor. We did not expect to give the names of our witnesses and what they have to testify to. It is up to the Chinaman himself to affirmatively show, as my understanding—

The COURT.—To show what?

[57] Mr. RICHEY.—To show his right—it is our contention that that matter will not be gone into if the answer meets the petition and shows the jurisdiction in the Commissioner.

The COURT.—I understand that your answer admits that he had this certificate.

Mr. RICHEY.—Yes.

The COURT.—That by your answer puts the burden on the Government.

Mr. RICHEY.—Before the Commissioner, yes; not here your Honor.

The COURT.—I don't understand that that makes any difference.

Mr. RICHEY.—It makes all the difference. If the Commissioner has jurisdiction, your Honor will not go into the facts.

The COURT.—I want to give the Government a fair opportunity to present—is it your position, Mr. Richey, that the Government is not required here to put in any proof at this time or make any showing whatever as to the real cause of detention of this Chinaman?

Mr. RICHEY.—At this time, no, your Honor.

The COURT.—In this proceeding?

Mr. RICHEY.—No, your Honor; on this basis [58] that your Honor is not entitled to go into any of the facts after your Honor has ascertained that the Commissioner before whom this proceeding was brought has jurisdiction in this matter—that your Honor will not go into the facts any further than the ascertainment of whether or not the Commissioner had jurisdiction.

The COURT.—Have you any cases that hold that?

Mr. SEABURY.—We will not dispute the cases calling attention to the fact that the writ of *habeas corpus* cannot be used as a writ of error.

The COURT.—I mean general statements. I mean specific cases where that position is held. The position of counsel is so new to the Court that I want to be sure.

Mr. RICHEY.—I would have to get them, your Honor.

The COURT.—You have not read any carefully?

Mr. RICHEY.—Well, here are some. I think that I should say holds that specific thing.

The COURT.—You have not cited any case here that I should say holds that specific thing.

Mr. RICHEY.—I have not read any cases to your Honor. The moment it be shown that the complaint has been lodged before a Commissioner, charging that [59] the defendant was a Chinese person unlawfully within the country, there is no inquiry upon the writ of *habeas corpus* providing no abuse has been done the defendant in the prosecution of that matter. Of course, if the Government had prolonged and kept the man a prisoner for months, we do not contend for a moment that he would not have the right to force matters under such a condition.

The COURT.—But suppose it appear upon the showing that the arrest was merely arbitrary; that there was no cause for it—no reason for it. Would the Court then remand the case and not go into it? I do not understand that to be the law.

Mr. RICHEY.—No—

The COURT.—That is the position here—that is exactly the position here.

Mr. RICHEY.—We will be glad to show that it has not been arbitrary. We have witnesses here ready to go to trial down there this afternoon.

The COURT.—We must dispose of this inquiry, and care nothing about the other except as it bears upon the right of the Court to proceed with this investigation. Under the showing here, it does appear that this man was arbitrarily held and is arbitrarily held because he has a certificate valid upon its [60] face and there are no facts to show that this certificate was invalid.

Mr. RICHEY.—There is no contention that it is invalid. We do not contend that it is invalid.

The COURT.—Is there any contention that this certificate be wrongfully in the possession of this defendant? He has the right to use it so long as it has not been determined that he is unlawfully here.

Mr. RICHEY.—That might be a question as to what might be determined lawfully in possession.

The COURT.—On the face of this return, Mr. Richey,—we tried the issue raised by the return. Now, from the return—we are bound by the return—what may lie back of the return?

Mr. RICHEY.—The return to the writ denies that the defendant has any right to be in the United States.

The COURT.—That is a question of law—the purpose of the writ. Exhibit the facts, nothing more. Exhibit the facts, whatever they may be. If this man has forfeited his right and standing under this certificate, that fact can be disclosed and might be an issue to try.

Mr. KENT.—I think Mr. Richey's position is that this Court has no right to try this case and it ought to be done before the Commissioner.

[61] The COURT.—I think it resolves itself down to this proposition: it having appeared here that a warrant of arrest was issued under a complaint sworn to before the Commissioner, and that the defendant was arrested under this warrant, and that this ends this examination and further proceedings must terminate and the man may be remanded to await the result of that contention.

Mr. RICHEY.—That is my contention, your Honor. Unless this Court here will hold that this complaint is not a sufficient complaint—

The COURT.—If we take that extreme view—say, ordinarily, that this is a case where the Court should exercise its discretion so as to permit these examinations to be held by the committing magistrate rather than by the Court by whom the writ is issued. Suppose we take that extreme view. If it should affirmatively appear here from the showing made that the detention was unlawful—that is to say that there was no warrant for the detention—it is only in those cases where a substantial question of fact is raised to be tried, and a finding of fact to be made by the Court, and where the Court would decline to proceed to make a finding of fact, that it would remand the case to the committing magistrate to make [62] the finding. It is difficult for the Court to conceive upon what theory the Government wishes to proceed against this Chinaman in the face of that certificate. Upon the face of that certificate, it does look like an arbitrary arrest.

Mr. RICHEY.—The Government informed counsel for the defendant that the defendant went out of the United States and the—

The COURT.—The Court has not been advised as to that.

Mr. KENT.—The contention of Mr. Richey is that this case should be remanded and heard before the Commissioner.

The COURT.—I am not certain—in some cases I would say that, if it is a question of fact, and not a

question of law—I would not remand a case upon a question of law—but upon a question of fact I am inclined to think I would. What question of fact is there in this return? None at all. This is not a question of fact—it is a question of law. Let me see the original petition. I think, Mr. Richey, if you will examine those cases, you will find that in every instance where the courts have remanded the cases, it was because of some issue of fact to be tried and determined. I know of no [63] instance where a Court of superior jurisdiction has remanded a case to a Court of inferior jurisdiction when the right of the defendant turns upon a question of law. Can counsel?

Mr. KENT.—I am quite sure that your Honor is right. As your Honor has suggested, it was a question of fact, but here it is a mere question of law—your Honor can do nothing under the circumstances but grant the motion.

The COURT.—If it be true that this man has a merchant's certificate, I am inclined to think—

Mr. RICHEY.—It is not a merchant's certificate.

The COURT.—It is a question of law whether it is a merchant's certificate or a laborer's.

Mr. RICHEY.—It is neither.

The COURT.—How is it treated?

Mr. RICHEY.—It is simply not a laborer's.

Mr. KENT.—This is a certificate of his right to remain here, and he is described as a person other than a laborer.

Mr. RICHEY.—Laborers cannot come here.

Mr. SEABURY.—He was indisputably here.

The COURT.—I don't see any reason why the Court should remand the defendant upon the questions [64] of law raised by this return.

Mr. RICHEY.—We have raised question of fact in our answer. They say he has been here all the time. We deny—

The COURT.—That is an immaterial fact.

Mr. RICHEY.—That is part of the case—he was out of the country.

The COURT.—Do you affirmatively say that he has been out of the country?

Mr. RICHEY.—They affirmatively set up that he has been here, and we deny that he has been here. In substantiation of their claim, they produce a certificate, and we are ready to produce evidence to controvert it.

The COURT.—You say you are ready?

Mr. RICHEY.—Yes.

The COURT.—You say you are ready now to raise that?

Mr. RICHEY.—Yes.

The COURT.—Why not set it up?

Mr. RICHEY.—We thought we set it up.

Mr. KENT.—Your Honor, I think that every opportunity has been given. Mr. Richey's position has been explained several times; that this Court has no power to try this, but it should go back to the [65] Commissioner. We are here now, your Honor, upon the sufficiency of this return.

The COURT.—What do you say about this return? Is there any denial of your allegations of his

being in the country a number of years sufficient to raise that?

Mr. KENT.—Their allegations in their return is immaterial—nothing further than in the complaint that that certificate was issued to us. We produced the certificate here, and that is absolute authority for this man to be in the United States. There is nothing set up to controvert it. There is nothing for your Honor to do. There is no issue to try.

Mr. SEABURY.—For example: Suppose, if your Honor please, if the case went to trial, we would ask for a concession of identity; we would offer the certificate and rest.

Mr. KENT.—And they could offer no evidence on their part, and the evidence is inadmissible, as you suggest, under the pleadings. That is why we have a right to make a motion on the pleadings. They raise no issue.

Mr. SEABURY.—It is true that we did recite the history of the case to show that the man had been domiciled in the United States since early boyhood. [66] That is really immaterial, and merely done to support the fact that he is an established domiciled person in the United States. I think it is clear that there is no issue before the Court except our motion for judgment, which is purely a question of law. The only question raised by the petition and the return is a question of law.

Mr. RICHEY.—Having set up the residence, and it being denied, it does become material then?

The COURT.—I don't know whether it is the denial of a material allegation or whether it goes—

Mr. SEABURY.—But, your Honor, if it be denied, the production of the certificate recites—the certificate establishes his right to be and remain in the United States.

The COURT.—Calling attention to the particular denial in the answer, they raise the question of this issue.

Mr. RICHEY.—It is about three-quarters of the way down on the second sheet.

**[Order Granting Motion.]**

The COURT.—That is not a denial of its truth. It alleges that all of the allegations are denied, and, even, if true, are immaterial, irrelevant and incompetent. I don't think that general denials of that character raise an issue in *habeas corpus* [67] matters. The motion is granted.

Mr. RICHEY.—Exception.

Mr. KENT.—The record may show that the judgment on the pleadings is granted.

Mr. RICHEY.—We take exception.

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**[Certificate of Stenographer to Transcript of Record  
of Proceedings Had on March 3, 1913.]**

**[68]** State of Arizona,  
County of Maricopa,—ss.

I, Raymond Allee, do solemnly swear that I am the stenographer who took down in shorthand the proceedings in the District Court of the United States for the District of Arizona, on the third day of March, 1913, taken and had in the matter of the application of Jim Hong for a writ of *habeas corpus*;

and that the foregoing transcript, being pages 1 to 67, inclusive, is a full, true and correct record of all the proceedings taken and had at said hearing to the best of my skill and ability.

RAYMOND ALLEE.

Subscribed and sworn to before me this 19th day of June, A. D. 1913.

MAYNARD A. FRAZIER,  
Notary Public.

(My commission expires November 20th, 1916.)

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[Praecipe for Transcript of Proceedings Had on  
March 3, 1913.]

[69] June 21, 1913.

Dear Sir:

Please include in the transcript of record to be lodged with the Clerk of the Circuit Court of Appeals for the Ninth Circuit, the transcript of the proceedings had before the U. S. District Court for the District of Arizona on March 3, 1913, in the Habeas Corpus proceedings of Jim Hong and oblige,

Yours truly,  
EDWARD KENT,  
By W. M. SEABURY and  
W. M. SEABURY,  
Attorneys for Jim Hong.

To Hon. ALLAN B. JAYNES,  
Clerk of the U. S. District Court, District of  
Arizona.

[Certificate of Clerk U. S. District Court to  
Supplemental Transcript of Record.]

United States of America,  
District of Arizona,—ss.

I, Allan B. Jaynes, Clerk of the United States District Court for the District of Arizona, do hereby certify that *that* the foregoing pages numbered 1 to 69 inclusive, constitute and are a true and complete SUPPLEMENTAL TRANSCRIPT OF THE RECORD in the Matter of the Application of Jim Hong for a Writ of Habeas Corpus, No. C.-418, in said court, being a copy of the Transcript of the Proceedings in said cause before Honorable Richard E. Sloan, Judge, filed in the office of the Clerk of said court subsequent to the preparation of the Transcript of the Record on Appeal in said cause.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court this 25th day of June, A. D. 1913.

[Seal] ALLAN B. JAYNES,  
Clerk, United States District Court, District of Arizona.

[Endorsed]: No. 2278. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Jim Hong, Appellee. In the Matter of the Application of Jim Hong for Writ of Habeas Corpus. Supplemental Transcript of Record. Filed by and on Behalf of Appellee. Upon Appeal from the United States District Court for the District of Arizona.

Filed August 16, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Meredith Sawyer,  
Deputy Clerk.



# **United States Circuit Court**

## **Of Appeals For The Ninth Circuit**

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**IN THE MATTER OF THE  
APPLICATION OF JIM HONG }  
FOR A WRIT OF HABEAS CORPUS.** } **ON APPEAL.**

**C. A. OVERLOCK, United States** }  
**Marshal,**

**Appellant.**

**vs.**

**JIM HONG,**

**Appellee.**

## **BRIEF OF APPELLANT**

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This action arose out of the petition of Jim Hong, filed in the United States District Court for the District of Arizona, praying for a writ of habeas corpus, directed to the United States Marshal for the District of Arizona, to produce the body of the said Jim Hong before said court, to the end that he, the said Jim Hong, be discharged from unlawful restraint and custody. The writ was granted; the said Jim Hong was before said court; a hearing was had, and he was, by the said court, ordered discharged, and the said court in its final order gave petitioner judg-

ment on the pleadings; found that petitioner was then and at all times theretofore had been, lawfully within and was entitled to be and remain within, the United States; that he was then unlawfully restrained of his liberty; and, that he be discharged from custody. Whereupon this appeal was taken to this Court.

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### STATEMENT OF FACTS

On the 21st day of November, 1912, in the city of Phoenix, District of Arizona, one Jim Hong, a Chinese person, was arrested on a warrant issued by a duly appointed, acting and qualified United States Commissioner, residing in the City of Phoenix, Arizona, upon a sworn complaint theretofore made before and filed with said Commissioner by O. T. Richey, Assistant United States Attorney for the District of Arizona, charging that said Jim Hong was a person of Chinese descent unlawfully within the United States. Said Jim Hong was taken before the said Commissioner, arraigned, pleaded not guilty, and gave bond. At the request of counsel for said defendant Jim Hong the trial of the case was delayed and postponed, the United States being at all times ready to proceed therewith, and the case was finally set for trial before the Commissioner for the third day of March, 1913, by agreement. On the 27th day of February, 1913,

the said Jim Hong, through his counsel, filed his petition for a writ of habeas corpus in the United States District Court for the District of Arizona, before Hon. Richard E. Sloan, portions of which said petition are as follows, to-wit:

"x x x 1892; and that your petitioner has since the said year, at all times been lawfully within the United States, and has never during said time departed therefrom."

(T. of R. p. 1).

"That he was born in Canton, China, and first came to the United States in or about the year 1874."

(T. of R. p. 2).

"He returned to this country and was admitted into this country again x x x about the year 1890."

(T. of R. p. 2).

"Nor did he at said time, or at any time conceal any facts whatever concerning himself from the authorities of the United States having charge of the admission into this country of persons of Chinese descent."

(T. of R. p. 3).

"About the year 1894, at which time your petitioner went to the City of Houston; x x x thereafter he went to Beaumont, Texas, and shortly thereafter established himself in business x x at Sour Lake, Texas."

(T. of R. pp. 3 and 4).

"He remained x x x in Sour Lake, Texas, for a period of eight or nine months and x x x because

of the misfortune x x x your petitioner returned to Beaumont, Texas, and thereafter returned to San Francisco and Sacramento, California, in which places he remained until about the year 1910, at which time he came to the City of Phoenix, in the Territory of Arizona."

(T. of R. p. 4).

The petition further alleges that the petitioner was at the time of its filing in the custody of the United States Marshal for the District of Arizona, under the said warrant, and that he was held to await an order of deportation to be made (T. of R. p 6), and prays that a writ of habeas corpus issue, etc. The petition is verified before the Clerk of said court.

Upon this petition there issued out of said court a writ of habeas corpus, commanding the United States Marshal for the District of Arizona to bring the body of Jim Hong, the writ and the cause of the said Jim Hong's detention, before the Hon. Richard E. Sloan, Judge of the United States court for the District of Arizona, on the third day of March, 1913. That almost immediately after the issuance of said writ, the said Judge admitted the said Jim Hong to bail in the sum of five hundred dollars, which was furnished, thereby depriving the Marshal of the power to comply with the command in the writ contained with reference to producing the body of Jim Hong before the court. That immediately prior to the filing of the said petition, Jim Hong, his counsel, and one of his bail, came to Deputy United States Marshal B. Anderson, and said counsel and bail attempted

to deliver said Jim Hong into the custody of the Marshal, and asked the Deputy to not place Jim Hong in jail, but to permit him to sit in his office for a short period of time; this the Deputy Marshal permitted to be done. While the said Jim Hong was thus sitting in the office of the said Deputy Marshal, the petition was filed, the writ issued and served upon the Deputy Marshal. Immediately thereafter the order was made admitting Jim Hong to bail in the same sum and, the same persons qualifying as his sureties, the said Jim Hong was released, not more than thirty minutes having elapsed between the attempted surrender of the petitioner and his liberation on bail.

On March 3, 1913, the Marshal made his return to the writ (T. of R. p 14), and at the same time O. T. Richey, Assistant United States Attorney, on behalf of the United States, moved the court that the United States be permitted to intervene, and offered a pleading in intervention in the habeas corpus proceeding, which pleading does not appear in the Transcript of the Record. The Court overruled the motion and refused the offer of the pleading. Thereupon the Marshal requested that he be permitted to amend his return, which request was granted. Thereupon the Marshal filed his first amended return (T. of R. p. 18), and the United States, through the said Assistant United States Attorney, again moved the court that it be permitted to intervene, and offered the same pleading. Said motion was again overruled and said offer again refused. Thereupon the Marshal was again permitted to amend his return (T. of R. p. 21), and thereafter the Marshal filed his second amended return, which contains many mat-

ters and things which, according to the contention of the United States, should have been set up in a petition in intervention on behalf of the United States, or otherwise brought to the attention of the court, had the court permitted the United States to intervene. Demurrer was filed to the first and second amended returns of the Marshal, and upon the pleadings therein named argument was had by respective counsel.

The Court ruled that it had jurisdiction to inquire into the probable cause, but did not state that it was its desire to go into that matter; Mr. Richey, the Assistant United States Attorney, stating to the court that, if it were going to take up the matter of probable cause, the United States had present in the court room two witnesses who would testify that the petitioner had been for several years in Mexico since the issuance to him of the certificate of residence, and that he had not complied with the law relating to the departure from and return to the United States of duly registered Chinese persons. The Court, however, declined to receive such testimony, and proceeded, upon motion by petitioner's counsel, to make its final order and gave judgment on the pleadings (T. of R. p 36), discharged the petitioner, and made the following finding:

"And it appearing to the court's satisfaction that the said Jim Hong is now and at all times since the issuance to said Jim Hong of a certificate numbered 137,804, heretofore duly issued by the officers of the Government of the United States to the said Jim Hong, has been a person lawfully within the United States, and that the said Jim Hong is the person named therein, establishing

the right of the said Jim Hong under said certificate *lawfully to be and remain within the United States.*"

From this final order this appeal is taken.

#### ASSIGNMENTS OF ERROR.

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##### Assignment of Error 1.

The Court below erred, in denying to the United States the privilege of intervening, and in denying to the United States intervention in its own behalf in addition to any return the United States Marshal might make.

##### Assignment of Error 2.

The Court below erred, in ruling that it had jurisdiction of the body of the petitioner.

##### Assignment of Error 3.

The Court below erred, in giving petitioner judgment on the pleadings.

##### Assignment of Error 4.

The Court below erred, in discharging petitioner and making its findings without taking the testimony of two competent, material and reliable witnesses, then present in the court room, that petitioner had been in Mexico for several years since the issuance to him of a certificate of residence.

### Assignment of Error 5.

The Court below erred, in finding and determining, without a trial thereof in due course, that petitioner is lawfully within, and entitled to be and remain within, the United States, the Court below on habeas corpus proceedings possessing no jurisdiction or authority whatever to make any such findings or decree, nor to try such issue on habeas corpus proceedings.

### Assignment of Error 6.

The Court below erred, in finding that petitioner was unlawfully restrained of his liberty.

### Assignment of Error 7.

The Court below erred, in its Final Order and Decree, the same being contrary to law, the pleadings and facts.

### Assignment of Error 8.

The Court below erred, in exceeding its jurisdiction in making any findings whatever other than; whether the Court below obtained and had jurisdiction of the subject matter; whether the Court below obtained and had jurisdiction of the body of petitioner; whether petitioner was unlawfully restrained of his liberty.

### Assignment of Error 9.

The Court below erred, in ruling that Section 1018 R. S. U. S. does not obtain in the surrender of a defendant on bail in Chinese Exclusion actions before U. S. Commissioners.

## ARGUMENT.

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The jurisdiction of the Court below, in the first instance, depends upon the petition containing such statements of fact, that, if true, the United States Commissioner failed to have jurisdiction of the defendant, or, of the matter; or, that the petition made the showing that there were such gross delays and long incarceration of the defendant without opportunity for trial or hearing as to be unreasonable, unjust and to the prejudice of the rights of the defendant.

Was the petitioner, in fact, actually under such restraint and in such custody as to be restrained of his liberty so that he would be entitled to a writ of habeas corpus? He had never been, by order or command of the Commissioner, committed to the custody of the United States Marshal. True, the Marshal arrested him, but delivered him, on the warrant, into the custody of the Commissioner; he was arraigned; pleaded not guilty; and, thereupon, was immediately enlarged on bail by the Commissioner to appear for trial at a date to be later determined upon, this latter at the special instance and request of the defendant.

On February 27, 1913, a few days before the day which had been set for the trial of the case before the Commissioner, viz., March 3, 1913, and with the evident purpose of placing himself in a technical custody, so that he might, by petition, show apparent right for the issuance

of a writ of habeas corpus, to which we contend he was never entitled, petitioner attempted to have himself surrendered to the custody and restraint of the United States Marshal, as fully appears from the statement of facts included in this brief. We respectfully urge that the mere delivery of the petitioner into the custody of the United States Marshal by one of his bail is absolutely insufficient, either under Section 1018 R. S. U. S., or the common law rule bearing upon the subject, to place him in the legal custody of that officer. Section 1018 provides, in substance, that the defendant may be arrested by his bail and delivered to the Marshal before any judge or other officer having power to commit for the offense charged, and that, at the request of the bail, the judge, or other officer, shall recommit the party so arrested to the custody of the Marshal. The common law rule upon this subject is practically identical with the above cited statute.

**U. S. vs. Stevens, et al., 16 Fed. 101.**

The mere delivery of the petitioner to the Marshal gave that officer no authority whatever to restrain him. No recommitment was issued, he had no writ, nor any other order or legal document instructing and authorizing him to detain the petitioner. Such unauthorized and unwarranted restraint certainly could not be considered the confinement and custody which would authorize the issuance of the writ of habeas corpus. In fact, it cannot be considered a restraint, confinement, or custody at all, as the Marshal had no right, in law, to restrain or confine the petitioner without process of some nature. If the action be, as contended by petitioner, purely civil in its

nature and not governed by Section 1018, as was held by the lower court, then the rule certainly should be that, when the bail desires to surrender a defendant in a Chinese deportation case, they should be required to take him before some officer authorized to commit him and there deliver him into the custody of the Marshal and cause the committing officer to issue the proper papers authorizing the Marshal to restrain and confine the defendant.

Attached to the petition is a copy of the complaint filed before the Commissioner and the warrant issued thereon, which show upon their face that they are not defective, and the court, of course, takes judicial knowledge of the competency of its Commissioner. Therefore, the Commissioner had jurisdiction of the matter. The petition alleges the residence of the petitioner to be in Phoenix at the time of his arrest, and, as the complaint shows that the United States Commissioner also resided in Phoenix, that officer was the nearest Commissioner to the place where the petitioner was arrested. Therefore, the Commissioner had jurisdiction of the body of the petitioner.

Section 19, Act May 28, 1896, 29 Stat. L. 184.

Act August 18, 1894, 28 Stat. L. 416.

Act. March 3, 1901, 31 Stat. L. 1093.

Section 13, Act. Sept. 13, 1888, 25 Stat. L. 476-7,  
as re-enacted in the Act of April 27, 1904,  
ch. 1630.

According to our contention, the only matter then left into which the Court could lawfully inquire was probable cause under extraordinary circumstances, which do not appear.

It will be observed that the trial of the case before the Commissioner had been continued from time to time, always at the request of petitioner's counsel, until it was finally set for trial on the 3rd day of March, 1913, the very day upon which the final order in the habeas corpus proceeding was made. There is no showing whatever that the petitioner was denied a speedy trial, that he had been in restraint an unreasonable length of time, that the United States was guilty of any laxness, that petitioner had been deprived of any right before the Commissioner, or that petitioner had at any time applied to the Commissioner for any relief from the alleged wrongs complained of in his petition; on the contrary, it clearly appears that the delay in the trial of his case was at his own special instance and request. Under these circumstances, no writ should have issued in the first instance, and the writ having issued, we contend that the lower court had no right whatever to investigate the question of probable cause. To do so would be and was simply usurpation of the lawful powers and duties of the United States Commissioner. We concede that, in an extreme case, where through the fault of the prosecuting officers, unreasonable or unwarranted delay in the trial of an action of this nature has resulted, the question of probable cause might properly be investigated by the District Court, or the judge thereof, in a habeas corpus proceeding. Such, however, is the exact contrary to the case at bar.

The pleadings showing that the complaint, warrant and other formal documents were in regular and lawful condition, and the court not having the authority to inves-

tigate the question of probable cause in this particular case, the judgment on the pleadings should have been that the petitioner be remanded.

"If an inferior court or magistrate of the United States has jurisdiction, a superior court of the United States will not interfere by habeas corpus"

Horner vs. U. S. 143 U. S. 570; 36 Law Ed. 266

"If this court may issue a writ of habeas corpus x x x there can be no discharge under it if the court-martial had jurisdiction to try the offender for the offense with which he was charged, and the sentence was one which the Court could, under the law, pronounce."

Ex parte Mason, 105 U. S. 696; 26 Law Ed. 1213.

"The jurisdiction of this court to review the judgments of the inferior courts of the United States in criminal cases, by the writ of habeas corpus or otherwise, is limited to the single question of the power of the court to commit the prisoner for the act of which he had been convicted."

Ex parte Caroll, 106 U. S. 521; 27 Law Ed. 288.

"This Court cannot discharge on habeas corpus a person imprisoned under the sentence of a Circuit or District Court in a criminal case, unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold the prisoner under the sentence. A certified copy of the record of a sentence to imprisonment is sufficient to authorize

the detention of the prisoner, without any warrant or mittimus."

*Ex parte Wilson*, 114 U. S. 417; 29 Law Ed. 89.

"This Court has no jurisdiction for the discharge on habeas corpus of a person who is imprisoned under the sentence of a territorial court in a criminal case, on account of irregularities in the proceedings. The objections that the grand jury was improperly constituted and that the defendant was denied compulsory process for witnesses go only to the irregularities of the proceedings, not to the jurisdiction of the court."

*Ex parte Harding*, 120 U. S. 782; 30 Law Ed. 824.

"Neither irregularities nor error, so far as they are within the jurisdiction of the court, can be inquired into upon a writ of habeas corpus—because a writ of habeas corpus cannot be made to perform the function of a writ of error in relation to proceedings of a court within its jurisdiction. Under a writ of habeas corpus the inquiry is addressed not to errors, but to the question whether the proceedings and the judgment rendered therein are, for any reason, nullities, and unless it is affirmatively shown that the judgment or sentence, under which the petitioner is confined, is void, he is not entitled to his discharge."

*U. S. vs. Pridgeon*, 153 U. S. 62; 38 Law Ed. 631.

*Ex parte Watkins*, 3 Peters, 193; 7 Law

Ed. 650.

*In re Li Sing*, 86 Fed. Rep. 896.

*In re Leo Hem Bow*, 47 Fed. Rep. 302.

*In re Gut Lun*, 83 Fed. Rep. 141.

Habeas corpus will only inquire into the jurisdiction of the Commissioner in the premises.

*In re Tsu Tsé Mee*, 81 Fed. 702.

*In re Metzger*, 5 How, 176; 12 Law Ed. 104.

*In re Kaine*, 14 How. 103; 14 Law Ed. 345.

*Grin vs. Shine*, 187 U. S. 181; 47 Law Ed. 130.

*In re Cuddy*, 131 U. S. 280; 33 Law Ed. 154;

*Wight vs. Nicholson*, etc., 147 U. S. 136; 33 Law Ed. 865.

*In re Rullo*, 43 Fed. Rep. 62;

*Ekin vs. U. S.*, 142 U. S. 651; 35 Law Ed. 1146.

Writ of habeas corpus will not issue pending examination, where petition fails to state facts showing that the magistrate is without jurisdiction, and should be dismissed immediately upon ascertainment that the magistrate had jurisdiction.

*In re Green*, 60 Pac. 82.

*In re Hacker*, 73 Fed. Rep. 464.

And will not interfere with magistrate if he have jurisdiction.

*Price vs. McCarthy*, 89 Fed. Rep. 84.

*Horner vs. U. S.* 143 U. S. 570; 36 Law Ed. 266.

And is not to fulfill the functions of an appeal or writ of error.

Ex parte Tyler, 149 U. S. 164; 37 Law Ed. 689.

In re Swan, 150 U. S. 637; 37 Law Ed. 1207.

No formal or written complaint is necessary to give jurisdiction to Commissioner in Chinese Exclusion cases.

Wong Quan and Lee Joe vs. U. S., 149 U. S. 698; 37 Law Ed. 905.

Ah How vs. U. S., 193 U. S. 65; 48 Law Ed. 619.

Even where right under the Federal Constitution has been denied, it would seem to be the better practice to leave petitioner to his remedy by direct proceedings.

Reid vs. Jones, 187 U. S. 153; 47 Law Ed. 116.

Where petitioner fails to show in his petition that he has invoked the action of the Commissioner upon the matters complained of in his petition, the writ should not have issued.

In re Lancaster et al., 137 U. S. 393; 34 Law Ed. 713.

In re Bonner, 57 Fed. Rep. 184.

If it appear jurisdiction has not been exceeded and the proceeding is regular on its face, the petitioner will be remanded.

Turner vs. Conkey 31 N. E. 777.

"Habeas corpus will not bring into review errors

and irregularities, whether relative to substantive rights or law of procedure of a court with jurisdiction, the remedy being by appeal, exception, or writ of error."

Dimmick vs. Tompkins, 194 U. S. 540; 48 Law Ed. 1110.

Harkrader vs. Wadley, 172 U. S. 148-164; 43 Law Ed. 399-404.

Ex parte Comm. Wlth. Virginia and Coles. 100 U. S. 339; 25 Law Ed. 676.

Ex parte Albert Siebold, 100 U. S. 371; 25 Law Ed. 717;

U. S. vs. Pridgeon, 153 U. S., 48-63; 38 Law Ed. 631-637;

In re Chow Loy, 110 Fed. Rep. 952.

Ex parte McMinn, 110 Fed. Rep. 954.

"Pending proceedings for extradition regularly and constitutionally taken under the Acts of Congress cannot be put an end to by writ of habeas corpus."

Terlinder vs. Ames, 184 U. S. 270; 46 Law Ed. 534.

The petitioner maintains that the action before the commissioner is entirely civil in its nature.

"As a general rule the court will not in habeas corpus proceedings on behalf of one confined under mesne process in a civil action inquire into the truth of the facts alleged in the declaration and affidavit upon which the order of arrest is made."

## State vs. Bridges 64 Ga. 146-155.

In the last cited case the court says that to do this "would be to engage the habeas corpus court in a work of sub-soiling which can be fitly done only by the court in which the main action is pending, and upon a regular trial in the due course of the proceedings."

Petitioner alleges he is a person other than a laborer, on the basis that his certificate so states. The certificate states him to be a "person other than laborer", *but* in describing his occupation in said certificate states it to be "Restaurant Keeper". A restaurant keeper is a laborer regardless of any statement to the contrary in his certificate of residence, and any such statement in the certificate that he is not a laborer is not binding or controlling. The petitioner, Jim Hong, is a laborer under the provisions of the laws and treaties governing persons of Chinese descent while in the United States.

## U. S. vs. Chung Ki Foon, 83 Fed. Rep. 143.

And the United States Commissioner had jurisdiction to try and determine whether he had violated the Chinese Exclusion laws. This is too well established to require authorities thereon.

Upon the ruling of the Court that Jim Hong had been legally surrendered, the United States moved the Court that it be allowed to intervene and, through its Attorney, O. T. Richey, Assistant United States Attorney for the District of Arizona, offered its pleading in intervention. The Court ruled that there was no provision for such course and overruled the motion and rejected the offer of the pleading. It must be plain to any Court that the United States has such an interest in the disposition of a person

of Chinese descent under the Chinese Exclusion laws as to entitle it to be a party to any proceeding affecting such disposition and the United States should have been permitted to intervene.

In re Wong Kim Ark, 71 Fed. Rep. 382.

In re Jung Ah Lung and Jung Ah Hon, 25  
Fed. Rep. 141.

Ex parte Chin King and Chan San Hee, 35  
Fed. Rep. 354.

If the Court was going to take into consideration probable cause of restraint, it was its duty to institute such inquiry and it should have indicated to the United States that such was the intention of the Court, especially in view of the request of the United States that the Court so indicate one way or the other, and the Court, refusing to so indicate, after such request on the part of the United States, together with the statement that the United States had two reliable and competent witnesses then in the Court Room, each of whom would testify that the petitioner had been in Mexico for several years since the issuance to him of his certificate of residence, should not have considered the certificate of residence offered by petitioner unless the witnesses were permitted to testify. The Court, if it was going into probable cause, was, in duty bound, of its own motion, to direct such inquiry. Shall a court sit dumb when such request be made under such circumstances and then afterward be heard to say: "Yes, you said that, but you did not call your witnesses and have them sworn." Is that the course our courts shall take in such proceedings and under such circumstances? We think not.

Is the Final Order of the Court below on the pleadings? If it is, what consideration was given the certificate mentioned in the Final Order? If it is on evidence in probable cause, why is the mention made of judgment on the pleadings? Is the Final Order made on the pleadings, or on evidence of probable cause? In either case such Final Order should not of right have been made. There was no sufficient showing in the petition or otherwise.

But it is against the action of the lower court in affirmatively attempting to establish in its final order the status of the petitioner that we most urgently protest. In said final order the court solemnly states, as an adjudicated fact, that the petitioner is lawfully entitled to be and remain in the United States. Surely the only matters which the court had the right or authority to determine were whether the district court had jurisdiction of the person and subject matter; whether the United States Commissioner had jurisdiction of the person and subject matter; and, under the circumstances above set forth, whether there was probable cause upon which to restrain the petitioner. A careful and exhaustive examination of all of the cases of habeas corpus arising out of Chinese deportation proceedings shows that in no single instance has any court ever before so held. The law provides that the defendant shall have a trial before a United States Commissioner, and, if ordered deported, may appeal to the district court. This habeas corpus proceeding has been used as a vehicle to oust the United States Commissioner of his jurisdiction and of his right to try and determine the case. In habeas corpus proceedings, the court has but authority to remand or discharge the petitioner. We take it that

the propositions just stated in this paragraph are elementary, and confidently assert that the action of the lower court in making its finding that the petitioner was lawfully within the United States and entitled there to remain, was in gross and palpable excess of its authority. The petition for the writ contained no prayer asking that the petitioner's status be established, and the court, in making such finding, not only exceeded its jurisdiction, right and authority, but actually went without the pleadings to make the finding of which we complain. The only findings that the court was lawfully entitled to make were either that the petitioner be remanded, or that he be discharged.

The entire proceeding in the court below is replete with error. The lower court had no jurisdiction in the first instance to issue the writ, and, upon the showing made in the pleadings, should have at once dismissed the same and remanded the petitioner. The findings, orders and judgment are in excess of its jurisdiction, and the court had no right whatever to determine the status of the petitioner.

The case should be reversed and the petitioner ordered remanded to answer the complaint before said United States Commissioner C. W. Johnstone.

Respectfully submitted,

J. E. MORRISON,

*United States Attorney for the District of Arizona.*

O. T. RICHEY,

*Asst. United States Attorney for the District of Arizona.*



No. 2278.

*United States Circuit Court of Appeals for the Ninth  
Circuit.*

THE UNITED STATES OF AMERICA,  
Appellant,  
vs.

JIM HONG,  
Appellee.

In the Matter of the Application of JIM HONG for a  
Habeas Corpus.

APPELLEE'S BRIEF.

This is an Appeal by the United States Marshal for the District of Arizona from a final order rendered in a Habeas Corpus proceeding in the District Court, for the District of Arizona, discharging the Appellee from custody.

FACTS.

On or about November 20th, 1912, the Assistant United States Attorney, for the District of Arizona, made complaint in writing before the United States Commissioner in Phoenix, Arizona, (R 10) to the effect that "Jim Hong is a Chinese person not lawfully entitled to be or to remain in the United States, and that the said Jim Hong is now in the District of Arizona," and prayed that a warrant be issued "for the arrest of the said Jim Hong; that he may be dealt with in accordance with law" (R 10).

Thereafter on the same day, the warrant sought was

issued and executed by the arrest of Jim Hong (R 8-9)

After this arrest and pending a hearing thereon, the prisoner was admitted to bail by the Commissioner, and after one or more adjournments, the hearing before the Commissioner was set for March 3, 1913 (R 24-25).

On February 27, 1913, one of the bondsmen of the prisoner, surrendered him to the Deputy United States Marshal at Phoenix, Arizona. (S. R. 8-9-10)

Shortly thereafter on the same day, one of the counsel of the prisoner applied to the District Judge for a writ of habeas corpus, which writ was granted February 27, 1913, (R 11-12), and made returnable before the District Judge on March 3, 1913.

After the writ had issued, application was made to the District Judge to admit the prisoner to bail, pending the hearing thereon, and the Judge admitted the prisoner to bail accordingly (R 12), and the bond prescribed was duly given (R 13).

On March 3, 1913, the return day of the writ, the petitioner was produced in Court at the opening thereof, pursuant to the condition of the bond, and was again delivered into the custody of the Marshal (S. R. 2).

Thereupon, the Marshal filed his return to the writ (R 10-14).

This return presented for determination only a preliminary issue of fact, namely; whether when the writ

was issued, the prisoner was or was not in the custody of the Marshal. It failed to set forth the cause of the prisoner's detention and alleged an inability to have the body of the prisoner before the Court as commanded in the writ.

The prisoner immediately traversed this return, denied the facts alleged by the Marshal, and affirmatively alleged, under oath, (R 16-17) that at the time the writ was applied for and granted on February 27, 1913, the prisoner was in the actual custody of the Marshal.

The District Judge clearly stated that his jurisdiction of the proceeding would, doubtless, depend upon the determination of this question of fact, and that if the prisoner was in the Marshal's custody when the writ issued, the District Judge had jurisdiction to grant the writ and entertain the proceeding; otherwise such jurisdiction would not exist (S. R. 6).

This issue was determined in favor of the prisoner upon the offer of proof and the concession appearing at pages 8-9-10 of the Supplemental Record, and the conclusion was that jurisdiction existed (S. R. 20).

In accordance with the permission granted by the Court, the Marshal filed an amended return (R 18).

This amended return also failed to disclose or even to assert any cause whatever for the detention of the prisoner. It consisted in a further elaboration of the admitted facts concerning the prisoner's surrender to the

Marshal, and concluded with the statement in substance that such custody of the prisoner as the Marshal then had, he delivered to the Court, in accordance with the directions of the writ.

Thereupon, the prisoner demurred to the amended return (R 20) and moved for judgment discharging the prisoner, on the pleadings (S. R. 20).

After a brief argument, the District Attorney moved for and was granted leave (S. R. 22) to file a further and second amended return.

This second amended return (R-21) as a pleading was little, if any, better than the two preceding returns, and was wholly insufficient as a return.

It consisted chiefly of rambling argumentative statements, most of which were irrelevant to the issue.

It presented the District Attorney's views of the situation and contentions in substance, as follows: It admitted that the only cause of detention was the complaint and warrant, copies of which were attached to and made a part of the petition for the writ, but it sedulously avoided and deliberately suppressed a statement of any fact whatever from which either the Court or prisoner, or his counsel could ascertain even the general character and nature of the acts or omissions upon his part, with which the prosecution intended upon a hearing to charge the prisoner, and it was impossible to determine from

the record of what the alleged illegality of the prisoner's presence in the United States consisted.

Notwithstanding the failure of the Marshal to state facts from which the jurisdiction of the Commissioner to direct the apprehension and detention of the prisoner could be ascertained and determined by the District Judge, the anomalous contentions were made in substance (1) that the Commissioner had jurisdiction of the offense charged (R 27), in alleged consequence of which, the District Court had no jurisdiction in the premises, although the learned District Attorney admitted that it was the duty of the District Court to inquire into these very matters, as appears from the following excerpt from the second amended return (R 23).

"And that the only matter under consideration by this Court is whether the United States Commissioner possessed jurisdiction in the premises complained of in the aforementioned complaint, and whether the detention, if detention there was, of the petitioner was proper."

In other words there was an admission that the Court might inquire into the cause of detention, but a persistent refusal to enlighten or inform the Court upon the subject and a total failure to show that the accused had committed any offense of which the Commissioner had jurisdiction and for which the accused could be lawfully deported. (2) The further contention was made in substance that the bail of the prisoner could only effect

a legal surrender of him by an observance of and compliance with the provisions of Section 1018 of the United States Revised Statutes, which provisions (admittedly) were not followed in the surrender, and that by reason of the failure to surrender as therein directed, as a matter of law, the prisoner was not in the custody of the Marshal when the writ issued, from which we assume that the District Attorney desires the inference to be drawn that the Court had no jurisdiction to grant the writ or to entertain the proceeding for this reason (R 28-29).

It is true that the second amended return contained general denials of almost all of the allegations of the petition, but these denials in every instance denied only legal conclusions or immaterial averments in the petition (R 23-24-25). The vital and essential allegations of the petition, namely; that the prisoner was then in custody detained under color of Federal process, and that the prisoner had a certificate of residence, which evidenced his right lawfully to be and remain within the United States, were alone sufficient to require the District Judge in the habeas corpus proceeding to inquire into the real cause of the prisoner's detention.

This second amended return contained admissions of these two vital propositions.

It admitted that the only process by which the prisoner was detained was that described in the petition (R

23), and that the prisoner had a certificate of residence, which (R 25)

"pending the trial of the said Jim Hong upon the said complaint hereinbefore mentioned \* \* \* was seized and held by the agents of the government of the United States, and that said certificate is now in possession of such agents and will be so held by such agents, subject to the use of said Jim Hong, as evidence of his right to be and remain within the United States."

This certificate, as appears from the record, pages 32-33, is one issued to a Chinese person *other than a laborer*, under the provisions of the Act of May 5, 1892, as amended by the Act approved November 3, 1893.

Upon the filing of this second amended return, counsel for the prisoner moved that the demurrer interposed to the amended return stand as a demurrer to the second amended return, and also moved for judgment upon the pleadings (S. R. 24).

The issues of law thus presented were argued at length (S. R. 24-54), and the prisoner's motions were finally granted (S. R. 54). The proceeding resulted in an order discharging the prisoner and adjudging his right to be and remain within the United States (R. 36), and from this order, this appeal is prosecuted (R 37-38).

Nine errors are assigned to the order of the Court below.

The first error assigned is that the Court below erred in denying the application of the District Attorney for leave to intervene.

We submit that this assignment is disposed of by the following considerations:

The appellant upon this appeal is the Marshal of the United States, for the District of Arizona. The government itself is not a party to the record, except as it is represented by the Marshal. It cannot be more of a party than it already is, whether the name of the government be substituted as appellant for that of the Marshal, as it appears in the record, or whether the government be represented by making the prosecuting attorney or some other officer a party to the record.

The interests of the government in this prosecution are amply fortified and protected by the Marshal, under the direction of the United States Attorney as counsel.

This is evident from the fact that the proposed petition in intervention became and was the second amended return, the word Marshal being substituted therein for the word intervenor. (S. R. p. 22).

Neither the government nor the Marshal were in any way aggrieved by the refusal of the Court to allow the United States Attorney to become a party to the record, and a consideration of this alleged error upon this appeal is wholly unauthorized and in reality, the record does

not present this question for review or consideration here.

If the learned United States Attorney feels aggrieved and prejudiced at his exclusion from the record in this cause as a party, his remedy, if any he had, was an appeal from the order denying his application to intervene.

If the question is reviewable at all, it clearly could only be so reviewed.

We deem this assignment so far beyond the matters which are properly the subject of review upon this appeal, that we preferred to discuss the assignment briefly at this point rather than to embarrass and confuse our later argument of the propositions which are presented for review by such discussion.

Assignment four (R 39-40), is intended as an assignment that the Court erred in discharging the petitioner "without the introduction of the evidence offered by respondent, to-wit: the testimony of two competent, material and reliable witnesses that the prisoner had been in Mexico for several years since the issuance to the prisoner of the certificate of residence."

This assignment is wholly unsupported by the facts as is shown by the various returns interposed by the Marshal and by the argument of the United States Attorney (R 16-18-19-21-31) (S. R. 30 et seq.).

So also are the statements made by counsel at page 6 and 19 of appellant's brief.

We do not wish to attribute to our learned opponents any willful mis-statement of facts, but we vehemently and earnestly deny that counsel apprised the court below of his present assertion that he had witnesses who could testify that the prisoner had ever been in Mexico or elsewhere beyond the United States.

No such statement was ever made in the court below, and the record, the pleadings, and the argument of our opponents conclusively establish this to be the fact.

The entire assignment is based and predicated upon a false premise, namely: that the District Attorney offered or even informed the Court that he had the testimony of any witnesses (whether they supported the characterization and commendation of the District Attorney that they were not only witnesses but "competent, material and *reliable*" witnesses) that the prisoner had been in Mexico for several years since the issuance of his certificate of residence.

The entire record shows that the learned District Attorney persistently and stubbornly pursued a policy of secretion and concealment as to the real facts behind the blanket charge of an illegal presence within the United States.

Beginning with the first return, instead of a frank statement of the cause of the prisoner's detention and an assertion of the ground upon which it was claimed that he had lost his right to be and remain in the United

States, as evidenced by his certificate of residence, we find merely the assertion that the prisoner was not in the Marshal's custody, and that he could not, therefore, be produced as directed (R 15).

When this shallow pretext was dissipated by proof to the contrary, an amended return was filed, which only detailed the facts then already established by proof concerning the surrender of the accused (R 18), and finally the substance of the second amended return upon this point was (R 22) that the habeas corpus proceeding was an attempt

"to force the United States to prosecute the complaint that Jim Hong is a person of Chinese descent unlawfully in the United States, in this Court in the first instance instead of in the Court of the United States Commissioner, C. W. Johnstone, the Commissioner before whom the complaint hereinbefore mentioned was filed."

Not a word or suggestion can be found in any of the returns that the basis for the prisoner's arrest was that he had since the issuance of his certificate of residence been in the Republic of Mexico or elsewhere beyond the United States, and, indeed, the suggestion now creeps into the record for the first time while this cause is pending in this Court upon appeal.

It is easy to see from an inspection of the Supplemental Record that our learned opponent persistently refused to offer any proof whatever to sustain the le-

gality of the prisoner's arrest and detention, or to put his pleadings in such shape that such proof would have been admissible under them, had it been offered and, moreover, that the learned Court below, not once but many times made it perfectly clear that if the District Attorney had any proof to offer ample opportunity for further amendment would be accorded him and the evidence, if offered, received and examined.

Thus counsel for the government defines his position, as follows (S. R. 30) :

"The only charges that the United States has to make is to charge that he is here unlawfully,—and all the charge that is necessary, is that he is here unlawfully—don't need to sign a complaint—take him before a Commissioner without any papers at all and state that he is here unlawfully."

THE COURT—Suppose he produces a certificate?

MR. RICHEY—It is up to the United States to controvert it. The United States has never been given an opportunity to controvert it. The trial has not been had.

THE COURT—This is a habeas corpus matter, and it is your duty and you must show by what authority he is detained.

MR. RICHEY—But, if your Honor please, it should be done before the Commissioner.

THE COURT—There is nothing in that contention that the District Court of the United States cannot inquire into the question of a detention on habeas

corpus. Then, if it does and the court has jurisdiction and the question is raised, it is for the Government to show the cause of his detention, and the cause of his detention is that he is here without a certificate or that he is a Chinese person, a laborer, here without a certificate.

MR. RICHEY—That is our contention; and it being his duty to show by affirmative proof his right to remain here, and there being an appeal from that Court, this Court will not look into these matters.

THE COURT—This is just the purpose of the writ of habeas corpus. That is just the purpose of it—exactly so. The purpose is not anything more than to require the United States in this form of proceeding to show affirmatively—I take it that the very distinction between the two cases is what led to the bringing of this matter rather than by the ordinary procedure before the Commissioner to determine it. It is the right of that man to appeal to this Court, and we have no business to deny a writ of habeas corpus when presented. When presented it is the business of the Government to come in with its showing. It makes no difference what we think of it—of the propriety of it—it is a duty thrust upon us, and we must comply with that duty. Now, here we are: it is a writ of habeas corpus, and *if the Government wants to present what it has in the way of a showing why this man should be detained, it ought to be produced so that we can inquire into it.* We have the jurisdiction. It is our duty to hear it. That jurisdiction being invoked, we cannot evade it.

Again at page 33 of the Supplemental Record, the following colloquy took place:

THE COURT—Suppose you have arbitrarily arrested this man and are holding him arbitrarily, this Court must inquire into that. We are not passing upon the sufficiency of your showing, but we are inquiring into the necessity of the Government of making some showing to justify the arrest and detention of this man. Otherwise, we must discharge him.

MR. RICHEY—The government is willing to meet any showing of the defendant's right to be here, which he is affirmatively required to make.

THE COURT—The Court does not criticise counsel as to the position he takes—only this: there is one thing to do: either proceed as in any other case of habeas corpus by the presentation of proof, or any showing you may make, or to grant the writ upon the theory that the Government has failed to present anything justifying the detention of the prisoner. \* \* \*

\* (S. R. 34-35.)

THE COURT—The Government may do one thing: they may stand upon the question of custody of the defendant at the time this application was made. That is all right. The Court will pass upon that. If you do not stand upon that, then, of course, you will have to stand upon the other question as to whether the petition makes out a prima facie case showing unlawful detention—detention in the absence of any showing by the Government which would contravene the allegations of the petition. \* \* \*

THE COURT—Well, I should like to have the matter thoroughly gone into. If there is any real cause for his arrest and detention, I should like to have an opportunity to pass upon it, but I am afraid under the return that there is nothing to go into

except the examination of the certificate. It seems to disclose *prima facie* his right to remain. That is enough to place the burden on the United States.

MR. RICHEY—If the Court please—if the Court hold that with the showing here we have to produce evidence the same as we would have to introduce, it puts the matter up in the same position that if at the time of trial the prisoner should go before the Commissioner and present his certificate, and we would produce our evidence if we had any. Now, if the Court is going to require—I mean if the Court is going to hold that he will discharge this prisoner if we do not controvert the claim he makes in the petition—

THE COURT—Of course, the Court does not say that—it says that I am afraid from the return as made here, there is no sufficient cause shown for his detention. \* \* \*

THE COURT—This complaint only states a matter of conclusion of law. (S. R. 44.)

MR. RICHEY—Suppose we don't make a complaint—just take him before the Commissioner. That would be the same thing.

THE COURT—Yes. (S. R. 45.)

MR. RICHEY—Then we would be compelled to produce his certificate.

THE COURT—Suppose he has produced his certificate?

MR. RICHEY—Then the United States is compelled to produce its evidence.

THE COURT—When the certificate is exhibited, that establishes a *prima facie* right.

MR. RICHEY—Yes, your Honor, and I ask now whether your Honor is going to take cognizance of that certificate in this proceeding to such an extent as to compel an introduction of evidence if we desire to controvert this proceeding. If you produce this before the Commissioner, that is sufficient for the Commissioner to discharge him unless we show proper evidence to the contrary. \* \* \*

THE COURT—It is for the counsel to say. It is, of course, improper for the Court to indicate what the counsel ought to do.

MR. RICHEY—I want to know what position the Court assumes, and then I will be able to know what we will be required to do.

THE COURT—The question before the Court, Mr. Richey, is not one of fact. It is one of law; whether the pleadings as are now presented—and by the pleadings I mean the petition filed by the petitioner for the writ, and the return as made by the Marshal—(page 46) show *prima facie* that this man is entitled to his discharge. They show that this man has a certificate, and there is no other reason given why that certificate should not be accorded the effect which certificates under the law are intended to be given. That is the right of a Chinaman to remain in this country. Whether this certificate is conclusive evidence or only *prima facie* evidence—is there any fact here set up by the Marshal in his return to show that he is unlawfully within this country, notwithstanding, his possession of this certificate, and I do not take it that there is.

MR. RICHEY—No, your Honor. We did not expect to give the names of our witnesses and what

they have to testify to. It is up to the Chinaman himself to affirmatively show, as my understanding  
\* \* \*

THE COURT—To show what?

MR. RICHEY—To show his right—it is our contention that that matter will not be gone into if the answer meets the petition and shows the jurisdiction in the Commissioner.

THE COURT—I understand that your answer admits that he had this certificate.

MR. RICHEY—Yes.

THE COURT—That by your answer puts the burden on the Government.

MR. RICHEY—Before the Commissioner, yes; not here your Honor.

THE COURT—I don't understand that that makes any difference. (S. R. 47.)

MR. RICHEY—It makes all the difference. If the Commissioner has jurisdiction, your Honor will not go into the facts.

THE COURT—I want to give the Government a fair opportunity to present—is it your position, Mr. Richey, that the Government is not required here to put in any proof at this time or make any showing whatever as to the real cause of detention of this Chinaman?

MR. RICHEY—At this time, no, your Honor.

THE COURT—in this proceeding?

MR. RICHEY—No, your Honor; on this basis that your Honor is not entitled to go into any of the facts after your Honor has ascertained that the Commissioner before whom this proceeding was brought has jurisdiction in this matter—that your Honor will not go into the facts any further than the ascertainment of whether or not the Commissioner had jurisdiction. \* \* \* (S. R. 48.)

THE COURT—But suppose it appear upon the showing that the arrest was merely arbitrary; that there was no cause for it—no reason for it. Would the Court then remand the case and not go into it? I do not understand that to be the law.

MR. RICHEY—No.

THE COURT—That is the position here—that is exactly the position here.

MR. RICHEY—We will be glad to show that it has not been arbitrary. We have witnesses here ready to go to trial *down there* this afternoon.

THE COURT—We must dispose of this inquiry, and care nothing about the other except as it bears upon the right of the Court to proceed with this investigation. Under the showing here, it does appear that this man was arbitrarily held and is arbitrarily held because he has a certificate valid upon its face and there are no facts to show that this certificate was invalid.

MR. RICHEY—There is no contention that it is invalid. We do not contend that it is invalid.

THE COURT—Is there any contention that this certificate be wrongfully in the possession of this de-

fendant? He has the right to use it so long as it has not been determined that he is unlawfully here.

MR. RICHEY—That might be a question as to what might be determined lawfully in possession.

THE COURT—On the face of this return, Mr. Richey,—we tried the issue raised by the return. Now, from the return—we are bound by the return—what may lie back of the return.

MR. RICHEY—The return of the writ denies that the defendant has any right to be in the United States.

THE COURT—That is a question of law—the purpose of the writ. Exhibit the facts, nothing more. Exhibit the facts, whatever they may be. If this man has forfeited his right and standing under this certificate, that fact can be disclosed and might be an issue to try. \* \* \*

MR. KENT—I think Mr. Richey's position is that this Court has no right to try this case and it ought to be done before the Commissioner.

THE COURT—I think it resolves itself down to this proposition: it having appeared here that a warrant of arrest was issued under a complaint sworn to before the Commissioner, and that the defendant was arrested under this warrant, and that this ends this examination and further proceedings must terminate and the man may be remanded to await the result of that contention.

MR. RICHEY—That is my contention, your Honor. Unless this Court here will hold that this complaint is not a sufficient complaint—(S. R. 50).

THE COURT—if we take that extreme view—

say, ordinarily, that this is a case where the Court should exercise its discretion so as to permit these examinations to be held by the committing magistrate rather than by the Court by whom the writ is issued. Suppose we take that extreme view. If it should affirmatively appear here from the showing made that the detention was unlawful—that is to say that there was no warrant for the detention—it is only in those cases where a substantial question of fact is raised to be tried, and a finding of fact to be made by the Court, and where the Court would decline to proceed to make a finding of fact, that it would remand the case to the committing magistrate to make the finding. It is difficult for the Court to conceive upon what theory the Government wishes to proceed against this Chinaman in the face of that certificate. Upon the face of that certificate, it does look like an arbitrary arrest.

MR. RICHEY—The Government informed counsel for the defendant that the defendant went out of the United States and the—

THE COURT—The Court has not been advised as to that. \* \* \*

THE COURT—I am not certain—in some cases I would say that, if it is a question of fact, and not a question of law—I would not remand a case upon a question of law, (S. R. 51) but upon a question of fact I am inclined to think I would. What question of fact is there in this return? None at all. This is not a question of fact—it is a question of law. Let me see the original petition. I think, Mr. Richey, if you will examine those cases, you will find that in every instance where the courts have remanded the cases, it was because of some issue of fact to be tried

and determined. I know of no instance where a court of superior jurisdiction has remanded a case to a court of inferior jurisdiction when the right of the defendant turns upon a question of law. \* \* \*

THE COURT—I don't see any reason why the Court should remand the defendant upon the questions of law raised by this return.

MR. RICHEY—We have raised questions of fact in our answer. They say he has been here all the time. We deny—

THE COURT—That is an immaterial fact.

MR. RICHEY—That is part of the case—he was out of the country.

THE COURT—Do you affirmatively say that he has been out of the country?

MR. RICHEY—They affirmatively set up that he has been here, and we deny that he has been here. In substantiation of their claim, they produce a certificate, and we are ready to produce evidence to controvert it.

THE COURT—You say you are ready?

MR. RICHEY—Yes.

THE COURT—You say you are ready now to raise that?

MR. RICHEY—Yes.

THE COURT—Why not set it up?

MR. RICHEY—We thought we set it up—

MR. KENT—Your Honor, I think that every opportunity has been given. Mr. Richey's position has been explained several times; that this Court has no power to try this, but it should go back to the Commissioner. We are here now, your Honor, upon the sufficiency of this return. (S. R. 52.)

In the face of the three returns which had been made and of the lengthy discussions which had taken place between the Court and counsel, in which the prosecuting attorney constantly denied the Court's jurisdiction to hear evidence upon the merits, and in which he had repeatedly declined to *offer* the evidence which he said he had, we cannot regard the feeble assertion contained on page 52 of the Supplemental Record, that our learned opponent was "ready" to produce evidence to controvert the certificate of residence as a substitute for an offer of proof. He rested content with the mere expression of opinion that he thought he had set up facts controverting the certificate of residence, although he made no effort whatever to secure the further amendment of his return to enable him to prove such facts, if they existed.

In reality he meant what he had previously stated (S. R. 48), "We have witnesses *here* ready to go to the trial *down there* (meaning before the Commissioner) this afternoon."

However "ready" our opponent may have been, he never offered his alleged proof, and never stated its alleged substance. He could not have expected the Court

or opposing counsel to call his alleged witnesses and he failed to call them himself. Indeed, he had deliberately declined by his pleadings to raise the issue in support of which their evidence could have been received.

We deem a further discussion of this assignment unnecessary, except to point out that the alleged evidence to controvert the certificate of residence, even if it had been offered, would have been inadmissible under the return which failed to allege any such facts.

It is clear, moreover, that it would have constituted no offense for the accused to have been in Mexico, even for a period of several years, as stated in the fourth assignment, provided the provisions of the law relating to departure and return of persons of Chinese descent from and to this country had been complied with. There is no claim or assignment that the accused had been in Mexico and that he had been there without the authority prescribed by law and had surreptitiously returned without like permission, so that standing alone, the mere assertion of a presence in Mexico is an empty and meaningless charge.

Assignment 2, 5, 8 and 9 (R 39, 40) each raise and present squarely the issue of the jurisdiction of the court below to make the order appealed from. Assignments 3, 6, and 7, are wholly insufficient to present any question for review (C. C. A. Rules 24) because of the general and vague character of each, and if these assign-

ments serve any useful purpose it can only be as a further reiteration of the only error specifically assigned, namely, that the Court below had no jurisdiction to make the order appealed from. Thus assignment No. 3 is as follows:

"The ruling of the court that the petitioner should have judgment on the pleadings and the granting of judgment and decree on the pleadings."

And Assignment No. 6

"The finding of the court that the petitioner was unlawfully restrained."

And assignment No. 7

"The final order and decree is contrary to law and to the pleadings and the facts."

So also the only facts alleged in the second amended return (R 21-31) are those claimed to support the contention of our opponent that the court below had no jurisdiction in the premises.

Appellant's brief shows that counsel's whole argument is based on a claim of lack of jurisdiction in the court below. Thus it appears that this is not only a case in which the jurisdiction of the court below is in issue, but one in which no other question is presented for review.

Therefore, in support of our motion to dismiss we confidently assert that this Court has no jurisdiction of this appeal.

Section 238 of the Judicial Code, which is a re-enact-

ment of the Act of March 3, 1891, C. 517, 26 Stat. 826 (U. S. Comp. St. 1901, p. 549) establishing the Circuit Courts of Appeals provides that

Appeals and writs of error may be taken from the District Courts \* \* \* direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from final sentences and decrees in prize causes: in any case that involves the Constitution or application of the Constitution of the United States: in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question, and in any case in which the constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

Section 128 of the Judicial Code, which prescribes the appellate jurisdiction of the Circuit Courts of Appeals, provides:

"The Circuit Courts of Appeals shall exercise appellate jurisdiction to review on appeal or writ of error, final decisions in the District Court \* \* \* in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court as provided in Section 238, unless otherwise provided by law. \* \* \*

We think the language of the Supreme Court in *Spreckles Sugar Refining Co. vs. McClain*, 192 U. S.

397, 407, is applicable to the case at bar, and settles the question raised in favor of the appellee. The Court said in part:

"If the case as made by the plaintiff's statement, had involved no other question than the constitutional validity of the Act of 1898, or the construction or application of the Constitution of the United States this court alone would have had jurisdiction to review the judgment of the Circuit Court." Citing Huguley Mfg. Co. vs. Galetan Cotton Mills, 184 U. S. 290, 295.

In principal this authority is applicable to the case at bar.

That the authority relates to a ground of exclusive jurisdiction, other than that involved here, is not important.

The Judicial Code expressly limits this court's jurisdiction in cases *other than those in which appeals and writs of error may be taken to the Supreme Court as provided in Section 238.*

The case at bar is such a case.

Craemer vs. Washington State, 168 U. S. 124, 127.  
 Dimmick vs. Tompkins, 194 U. S. 540, 546.  
 Chin Yow vs. U. S., 208 U. S. 8, 10.

Dissenting opinion by Circuit Judge Morrow, in  
*Re Can Pen*, 168 Fed. 485, 488, and in

*St. Louis, Mo., Co. v. Amor. Cotton Co.*, 125 Fed. 196  
*C.C.A. 8th Circuit, Circuit Judge Sanborn.*  
*Halpin v. Amorman*, 158 Fed. 548; C.C.A. 2d Cir. (1905)  
*Olds vs. Hattler Imbr. Co.*, 195 Fed. 9, 11  
*C.C.A. 6th Cir. 1912.*

Fed. 479, in that, in that case other questions than those of which the Supreme Court had exclusive jurisdiction by a direct appeal, were presented for review. These other questions drew to the appellate jurisdiction of this court all the questions presented by the record. Here the sole question which the record presents is one of which the Supreme Court has exclusive jurisdiction. There are no other questions in the case as made by the appellant's assignments which can draw to the jurisdiction of this Court a consideration of the questions which Congress has committed exclusively to the Supreme Court for determination.

Involving as it does the solitary question of the jurisdiction of the court below, the Supreme Court has exclusive jurisdiction and this Court has none. Judicial Code, Sec. 128, 238, and cases cited supra.

It follows therefore, that the appeal should be dismissed.

If our motion to dismiss be granted no further argument is needed in this Court to sustain the order of the court below, but if the motion be denied, we will be required to discuss the merits of the controversy not only for the purpose of showing that the court had jurisdiction to make the order appealed from, but to show that the order was right, and a proper exercise of judicial discretion. We therefore proceed to discuss the merits under the following postulates:

## POINT I.

## THE APPELLEE IS LAWFULLY WITHIN THE UNITED STATES.

The fact that the prisoner has a certificate of residence (R. 32) issued to him as a Chinese person other than a laborer under the Act of May 5, 1892, as amended by the Act of November 3, 1893, conferred upon him a certain status.

That status entitled him to be and remain in the United States until his certificate was revoked or until it was shown that he had forfeited his right to be here.

Lew Quen Wo vs. United States, 184 Fed. 685, 688.

Lee Ho How, 101 Fed. 115.

Re Tom Hon, 149 Fed. 842.

In Lew Quen Wo vs. United States, 184 Fed. 685-688, Circuit Judge Gilbert, referring to a certificate of identity issued to the appellant after the Commissioner of Immigration had passed upon his right to admission said:

"It is not like the certificate of residence provided for in the Act of 1893, which defined the method by which Chinese in the United States might obtain evidence of their right to remain. Those certificates were registered as the solemn act of the government and were intended to furnish evidence of the right of the holder thereof to remain in the United States and to be conclusive evidence of that right and they are not subject to collateral attack. In re See Ho How (D. C.) 101 Fed. 115; In re Tom Hon (D. C.) 149

Fed. 842. The object of the exclusion acts, as Mr. Justice Field said *In re Ah Sing* (C. C.), 13 Fed. 286, was not to expel Chinese laborers already in the United States, but to prevent the further immigration of Chinese laborers."

In *See Ho How*, 101 Fed. 115-117, Judge DeHaven, in discharging a Chinese laborer who had been ordered deported, and in referring to a certificate issued to him under the Act of 1892, as amended, said:

"The right which the certificate confers is a valuable one, of which the holder can only be deprived by the judgment of a court of equity in a direct action brought by the United States for the purpose of annulling it, or in a proceeding for deportation, by proof that since its issuance the holder has forfeited his right to remain in the United States by departing therefrom without procuring from the Collector of Customs of the district from which he departed a certificate entitling him to re-enter the United States, as provided in Article 2 of the Treaty of March 17, 1894, between the United States and China, and the regulations adopted by the Treasury Department for the purpose of carrying out the provisions of that article. \* \* \*. And upon precisely the same principle the judgment of deportation in this case must be held void in the extreme sense, and because it appears upon the face of the judgment that petitioner is in possession of an uncancelled certificate of residence, which, in the absence of a finding that he subsequently departed from the country and thereby forfeited the right conferred by such certificate, entitled him to remain in the United States."

But it is not every departure from the United States

that would operate as grounds for the forfeiture of such a certificate.

We respectfully contend that the status acquired by a merchant or Chinese person other than a laborer by domicile in the United States prior to the Act of 1892 and by registration thereunder, or under the act as amended in 1893, would not have been lost or rendered subject to forfeiture by a temporary departure from the United States.

Lau Ou Bew vs. U. S. 144 U. S. 47.

Ng Quong Ming, 135 Fed. 378-382.

U. S. vs. Wong Lung, 103 Fed. 794.

U. S. vs. Chin Fee, 94 Fed. 828.

Jew Sing vs. U. S. 97 Fed. 582.

Sprung vs. Morton, 182 Fed. 330-337.

Re. Buchebaum, 141 Fed. 221-223.

Nor do we understand that the case of Lem Moon Sing vs. United States, 158 U. S. 538, or anything contained in the case of the United States vs. Ju Toy 198 U. S. 253 affects the particular question now before this Court.

It has even been intimated, by way of dicta it is true, that even the departure of a laborer from the United States where the departure was only of a temporary or visitorial character is not necessarily such as to require his deportation.

U. S. vs. Trick Lee, 120 Fed. 989-991.

U. S. vs. Lee Yung, 63 Fed. 520.

In Sprung vs. Morton, 182 Fed. 330-337-339, District Judge Waddill (Eastern District of Virginia) said:

"It is equally well settled that aliens who have once lawfully acquired a residence in this country do not lose the same or become liable to deportation under the immigration laws by temporarily leaving the country and re-entering. The authorities to maintain the general proposition are numerous and might be cited almost without number. \* \* \* (citing some of the foregoing cases). Having been once lawfully admitted she no longer occupies the status of an alien woman seeking admission, but is a resident within the contry and as such entitled to all of the rights, privileges and benefits properly appertaining and accruing to her under the guaranties of the constitution and the laws of the land." (Citing many cases.)

Again In re Buchebaum (D. C.), 141 Fed. 222, Judge McPherson said:

"After an alien has once become a resident he is entitled to the same liberty of movement enjoyed by residents and citizens alike, and until he abandons his residence he is no longer amenable to the excluding provisions of the immigration law. That law is intended to operate when the immigrant presents himself for the first time, but after he has passed the scrutiny of the inspectors and has been admitted he is then entitled to the rights and privileges of residents in the United States as long as he continues to be a member of this class."

See also U. S. vs. Nakashima (9th C. C. A.) 160 Fed. 842, 844, and cases there cited.

The record in this case does not justify the discussion or presentation of the claim that the status of the accused has changed since the issue of his certificate and that he is now a laborer and as such subject to deportation. Such a contention is in reality an attempt to impeach collaterally the recitations in the certificate which as we have seen cannot be permitted. While it is true that it appears from the petition that due to financial reverses the accused is temporarily engaged in culinary and domestic pursuits, it has been frequently held that a mere temporary engagement in manual occupations does not effect a change of status which renders such a Chinese person liable to deportation as a laborer.

Re Chin Ark Wing, 115 Fed. 412.

U. S. vs. Foo Duck (Hunt J.) 163 Fed. 440; affirmed 9th C.C.A., 172 Fed. 856 (By Morrow J.)

U. S. vs. Louie Juen, 128 Fed. 522.

U. S. vs. Sing Lee, 71 Fed. 680.

In re Yew Bing Hi, 128 Fed. 319.

U. S. vs. Seid Bow, 139 Fed. 56.

U. S. vs. Leo Won Tong, 132 Fed. 190.

Ow Yow Dean vs. U. S., 145 Fed. 801-803.

U. S. vs. Yee Quong Yuen, 191 Fed. 28.

The existence of the certificate was alleged and admitted by the pleadings. This cast the burden upon the Government to allege and prove a forfeiture of the status thus created.

In U. S. vs. Wong Och Hong, 179 Fed. 1004, the defendant in a deportation case produced a certificate,

identified himself and rested,—In discharging the prisoner Judge Wolverton said: "Unless this case is overcome by the Government it logically follows that he should not be deported."

It follows, therefore, that the accused is lawfully within the United States and has a right to remain.

#### POINT II.

#### THE COURT BELOW HAD JURISDICTION TO GRANT THE WRIT AND TO ENTERTAIN THE PROCEEDINGS.

The jurisdiction of the court below to grant the writ and entertain the proceedings thereunder depended (1) upon the petitioner being in custody and actually restrained of his liberty when application for the writ was made and when it was directed to issue; and (2) in a *prima facie* showing that the detention of the accused was unlawful.

(1) It appeared that the accused was in the actual custody of the marshal at the time he applied for and was granted the writ.

The Court found the facts involved in this controversy in favor of the accused. While we do not claim for this finding any conclusive effect (*Wong Hung vs. Elliott*, 179 Fed. 110;) especially, when in reality there was no disputed issue of fact, still the conclusion of the learned court below is entitled to weight and consideration.

It was moreover correct. It really involved the decision of the question of law presented by the Government's contention that in the absence of a compliance with Sec. 1018 of the U. S. R. S. there could be no lawful surrender to the marshal. Section 1018 is as follows:

Sec. 1018 U. S. R. S. (Surrender of criminals by their Bail.)

Any party charged with a criminal offense and admitted to bail, may in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offense, and at the request of such bail, the Judge or other officer shall recommit the party so arrested to the custody of the marshal, and endorse on the recognizance, or certified copy thereof, the discharge and exonerature of such bail and the party so committed shall therefrom be held in custody until discharged by due course of law.

The Government's contention in this respect is conclusively answered by the authorities which hold that proceedings for the deportation of a Chinese person are civil and not criminal proceedings.

U. S. vs. Hung Chang, 134 Fed. 19.

U. S. vs. Mong You, 126 Fed. 226.

Woo Jew Dip vs. U. S. 192 Fed. 471.

Chin Wah vs. Colwell, 187 Fed. 592.

Re Lam Jung Sing, 150 Fed. 608.

Loo Foon Yim vs. U. S. Imm. Com. (9th C. C. A.)

145 Fed. 791.

Fong Yue Ting vs. U. S. 149 U. S. 698,730.

Ex parte Tom Tong, 108 U. S. 556.

One surrendered by his bondsmen is sufficiently in custody to warrant a discharge in a proper case on habeas corpus.

Ex parte Buford, 1 Cranch C. C. 456; 4 Fed. cases No. 2149.

Hence, there is nothing in the contention that because the accused failed to observe a statute which related to criminal and not to civil proceedings he was not in custody, or that the court was without jurisdiction to issue the writ of habeas corpus for this reason.

But assuming, without conceding, that at the time the writ issued the prisoner was still on bail, we nevertheless contend that the admission of the prisoner to bail did not relieve him from custody under the process by which he was apprehended and detained.

His prison walls had simply been enlarged so that temporarily they surrounded the limits of the District of Arizona.

It cannot be said that a person who cannot leave a definite territory is not restrained of his liberty. The accused was still in theory of law in the possession of the marshal.

"When bail is given, the principal is regarded as delivered into the custody of his sureties. Their dominion is a continuance of the original imprisonment." (Taylor vs. Taintor, 16 Wall. 371.)

The rule that a person admitted to bail is potentially

in custody, and so remains until discharged from imprisonment, is as old as the common law. Bacon's Abridgment says: "His bondsmen are his gaolers of his own choosing." In Anon's case (6 Mod., 231,) it is said: "The bail have their prisoner on a string, and they may pull the string whenever they please and render him in their own discharge."

The principle is established by many authorities:

- Cosgrove vs. Winney, 174 U. S. 68;
- In re Grice, 79 Fed. 633.
- U. S. vs. Stevens, 16 Fed. 105.
- Turner vs. Wilson, 49 Ind. 581.
- Divine vs. State, 5 Snead, 625.
- Levy vs. Arnsthall, 10 Grat. (Va.) 641.
- Ex parte Gibbons, 1 Atk., 238.
- Spear on Extradition, p. 445.
- Petersdorf on Bail, pp 91, 406.

Nor did the mere fact that a judicial proceeding or inquiry was already pending in which the ultimate right of the accused to liberty would be determined, deprive the district court of the power and jurisdiction to grant the writ and inquire into the cause of his detention.

- Ex parte Royall, 117 U. S. 241.
- Boske vs. Commingore, 177 U. S. 459-466.
- Minnesota vs. Brundage, 180 U. S. 499-501.
- Reid vs. Jones, 187 U. S. 154.
- Davis vs. Burke, 179 U. S. 399-402.
- Ex parte Gienn, 111 Fed. 257-260-261.
- U. S. vs. Fuellhart, 106 Fed. 914.
- Anderson vs. Elliott, 101 Fed. 609-613-615.

Re Turner, 119 Fed. 231, 233.  
Whitten vs. Tomlinson, 160 U. S. 231.  
State of New York vs. Eno, 155 U. S. 89.  
Baker vs. Grice, 169 U. S. 284-290.  
Fitts vs. McGhee, 172 U. S. 516, 533.

While in some of the cases cited the Court declined to issue the writ of habeas corpus, or, after the writ had been issued declined to discharge the prisoner thereunder, all of the cases recognize the jurisdiction and power of the court to grant the writ and inquire into the cause of detention. And this is so even though there be then pending some other proceeding in which the ultimate rights of the petitioner for the writ, might be ascertained and determined.

That this inquiry should, in the vast majority of cases in which issues of fact are presented, be confined to an inquiry into and not the determination of the controversy, is readily conceded, but where the inquiry which is instituted solely for the purpose of ascertaining whether jurisdiction to arrest and detain the accused exists and that such jurisdiction is not being oppressively or unfairly exercised, results in a determination as a matter of law that there was no power to continue to confine the accused upon the showing made, and as a matter of fact that process valid in the first instance was being oppressively used, then the Court not only has the power to intervene, but should exercise its judicial discretion by immediate intervention.

The Revised Statutes of the United States contemplated no such restriction upon the powers of the courts and imposed none. (U. S. R. S. 751, et. seq.)

Section 753 of the U. S. R. S. expressly authorized the writ to issue when the accused "is committed for trial before some court" of the United States, which shows that congress never intended so to curtail the powers of the district and circuit courts of the United States, that they would have no jurisdiction or right even to inquire into the cause of an unjust detention simply because of the pendency before some officer or tribunal of a proceeding in which the ultimate rights of the accused might be determined.

Nor did the Chinese exclusion acts impair the power and jurisdiction of the district courts and judges thereof in habeas corpus cases.

U. S. vs. Chung Shee, 71 Fed. 277, 281.

U. S. vs. Ah Lung, 124 U. S. 621.

(2) As already shown the petitioner had a certificate of residence and this established his right to be and remain in the United States. He was apprehended and detained upon process which failed to disclose any grounds for the forfeiture of such certificate.

This being the condition of the record it necessarily followed that the prisoner was unlawfully restrained of his liberty, which facts established his right to a discharge on habeas corpus.

## POINT III.

THE COURT BELOW PROPERLY EXERCISED  
ITS JUDICIAL DISCRETION IN DIS-  
CHARGING THE PRISONER.

Since it is clearly established that the Court had jurisdiction to grant the writ and to discharge the prisoner upon the showing made, the real question to be determined by this Court upon the merits is, did the court below abuse or improperly exercise the judicial discretion vested in it.

If there was a mere erroneous exercise of discretion as distinguished from an abuse of discretion, or palpable or gross error, this Court will not revise the order of the court below for such a cause, "unless the evidence in the record is such as to convince an appellate court that it was erroneous."

In re Can Pon, 168 Fed. 479, 484.

U. S. vs. Ronan, 33 Fed. 117, 119, 120.

Wong Heung vs. Elliott, 179 Fed. 110.

But we respectfully contend that the record and the order appealed from not only fail to show any abuse of discretion but that the order is right and the only order which the court below could lawfully have made upon the record before it.

The record before the Court presented no question of fact for determination.

The prosecution presented only the question of the

District Court's jurisdiction even to inquire into the cause of detention, and refused to disclose the real charge against the prisoner.

Undoubtedly the return showed that the Commissioner had a general jurisdiction over the charge that the prisoner was illegally here, but it failed utterly to disclose the existence of a particular jurisdiction to adjudge the presence of the accused in this country to be illegal in contradiction of an unrevoked certificate of residence. It could not have disclosed such a particular jurisdiction because there was no claim or assertion that the prisoner had done anything to forfeit his right to his certificate.

The existence of the general jurisdiction had been superceded by the admitted fact that the prisoner had a certificate, and until he was charged with having forfeited his rights so evidenced, no court or commissioner had jurisdiction of any kind to arrest and detain him.

We are aware that following the decision of the Supreme Court of the United States in *Ex parte Royall*, 117 U. S. 241, the courts have in many instances followed and extended the doctrine there announced.

The doctrine in question in the words of Mr. Justice Harlan (p. 251) is as follows:

"We are of the opinion that while the circuit court had the power to do so and may discharge the accused in advance of his trial if he is restrained of his liberty in violation of the National Constitution, it

is not bound in every case to exercise such a power immediately upon application being made for the writ.  
\* \* \* The injunction to hear the case summarily and thereupon 'to dispose of the party as law and justice require' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing under our system of government between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution.

"When the petitioner is in custody by state authority for an act done or omitted to be done in pursuance of a law of the United States or of an order, process or decree of a court or judge thereof, or where being a subject or citizen of a foreign state and domiciled therein he is in custody under like authority for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission or order or sanction of any foreign state or under color thereof, the validity and effect whereof depend upon the law of nations, in such and like cases of urgency involving the authority and operations of the general government, the obligations of this country to or its relations with foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under state authority."

We respectfully submit that wholesome as this doctrine is when applied to the class of cases to which it

was intended to be applied, the doctrine is wholly inapplicable to the case at bar.

The reasons which prompted its pronouncement are stated by Mr. Justice Harlan to have been to avoid a conflict between federal and state authority.

No such reason can exist for applying it in cases such as the case at bar. There is not and never has been danger of a conflict of jurisdiction between the district court and its creature, a United States Commissioner.

But where one is unlawfully detained upon federal process where the right of detention as disclosed by the habeas corpus proceedings depends only upon an issue of law and not of fact, which issue is fundamental in its nature and is not one merely of form, a prisoner is, in the discretion of the court, entitled to be discharged on habeas corpus.

Indeed in practically all classes of cases and at any stage of the proceedings where a person in custody claims to have and to be entitled to a *status* which exempts him from the arrest and detention to which he is subjected, that claim, in the exercise of the court's discretion, especially if it depends upon a question of law, is the proper subject of inquiry and determination in habeas corpus proceedings. "The fact that the court can inquire by habeas corpus into the question of whether a person is within the class amenable to a

particular jurisdiction has frequently been the subject of review by the courts and would seem to be no longer open to controversy."

Sprung vs. Morton, 182 Fed. 330-334.

Hopkins vs. Fachant (9th C. C. A.), 130 Fed. 839.

Rodgers vs. U. S., 152 Fed. 346.

U. S. vs. Nakashima, 160 Fed. 842. (9th C. C. A.)

And in U. S. vs. Sing Tuck, 194 U. S. 161-168, Mr. Justice Holmes in announcing the familiar rule that a prisoner should generally exhaust his remedies before the officers or tribunal charged with the duty to determine the facts relative to the matter involved, in explanation of Gonzales vs. Williams, said:

"In Gonzales vs. Williams, 192 U. S. 1, there was no use in delaying the issue of the writ until an appeal had been taken because in that case there was no dispute about the facts but merely a question of law."

In New York vs. Eno, 155 U. S. 89, 99, Mr. Justice Field in a dissenting opinion in which Mr. Justice Shiras concurred, recognized the same principle, and said,

"It would therefore subserve no useful purpose to proceed with the case in the state court, and thus ascertain what that court might have done or would have done had it possessed jurisdiction. \* \* \* He was therefore entitled to his discharge whenever the matter was properly brought to the attention of the Federal Court."

Judge Whitson in *ex Parte Koener*, 176 Fed. 478, 479, expressed the same principle as follows:

"While the courts are bound by findings duly made by the executive branch in matters of this kind (U. S. vs. Ju Toy, 198 U. S. 253; Pearson vs. Williams, 202 U. S. 281; Ocean Navigation Co. vs. Stranahan, 214 U. S. 321) they cannot properly refuse relief where, upon admitted facts, it appears as a matter of law that the person sought to be deported is not within the inhibition of the statute" citing Gonzales vs. Williams, 192 U. S. 1 Ex Parte Watchorn, 160 Fed. 1014.

And Circuit Judge Morrow recognized the principle in Lavin vs. La Fevre, 125 Fed. 693-696, where in holding that the executive officers of the government have exclusive jurisdiction to determine the right of an alien immigrant to land and come into the United States, he said:

"But whether in deporting an alien immigrant they are proceeding according to law, is a judicial question and may be inquired into by the court upon writ of habeas corpus."

The principle under discussion is exemplified in a great variety of cases and proceedings:

(1) It is a matter of common occurrence in deportation proceedings under the exclusion act.

Re Fong Yue Ting vs. U. S. 149 U. S. 698.  
Ex parte Koener, 176 Fed. 478.  
Ex parte Petterson, 166 Fed. 536, 539.  
Ex parte Watchorn, 160 Fed. 1014, 1016.

(2) And in proceedings under the immigration acts.

Sprung vs. Morton, 182 Fed. 330.  
 Gonzales vs. Williams, 192 U. S. 1.  
 U. S. vs. Wong Kim Ark, 169 U. S. 649.  
 U. S. vs. Tee Quong Yuen, 191 Fed. 28.  
 U. S. vs. Jung Ah Lung, 124 U. S. 621, 626.  
 Wan Shing vs. U. S., 140 U. S. 424.  
 Lau Ow Bew, Pet., 141 U. S. 583.

(3) So also in Federal removal proceedings under Section 1014 of the Federal Revised Statutes.

In re Beavers, 125 Fed. 988.  
 In re Beavers, 131 Fed. 366.  
 In re Greene, 52 Fed. 104, 106.

(4) And in extradition proceedings the same practice obtains.

Wright vs. Henkel, 190 U. S. 40, 57.  
 Terlindin vs. Ames, 184 U. S. 270, 280.

(5) And interstate rendition cases present similar examples of the same principles.

Nichols vs. Pease, 207 U. S. 100, 108.  
 Robb vs. Connelly, 111 U. S. 624.  
 Ex parte Morgan, 20 Fed. 298, 302.  
 Hyatt vs. Cockran, 188 U. S. 691.  
 Pettibone vs. Nichols, 203 U. S. 192.

(6) So also in cases of courts martial, where only a question of law is involved.

Ex parte Mulligan, 4 Wall. 2.  
 Hamilton vs. McCloughry, 136 Fed. 445, 447, 448.

And where, as in this case, it appears and the district

judge is satisfied that the deportation proceedings are being conducted in an arbitrary and unfair manner, even the very courts which most strictly follow the policy of allowing administrative officers the greatest latitude in the exercise of judicial functions formerly committed exclusively to our courts, recognize the plain duty of the district court to intervene by its writ of habeas corpus.

Chin Yow vs. U. S. 208 U. S., 8.

Tang Tun vs. Edsell, 223 U. S. 673.

Prentis vs. DeGiacomo 192 Fed. 467, 469.

Prentis vs. Sen Teung, 203 Fed. 25.

Edsell vs. D. Charley Mark, 179 Fed. 292.

The record in the case at bar shows a persistent refusal on the part of the prosecuting officers to disclose the real charge against the prisoner, a situation which violated the few rights still accorded one subject to deportation, for, while deportation proceedings are civil and not criminal in nature as we have seen, nevertheless the accused is entitled at least to a hearing in good faith, though not to a judicial trial, and the officers conducting the examination "must take the testimony pertinent to the questions involved of such witnesses as may be suggested by the applicant."

Re Can Pon 168 Fed. 479, 483; 9th C. C. A.

Indeed it has even been held that a Chinese person in a deportation proceeding is entitled to take depositions *de bene esse*, under United States Revised Statutes, Sec. 863.

Re Lam Jong Sing, 150 Fed. 608, 609.

Surely a deportation proceeding has become a travesty if a prosecuting officer may admit, as he must in view of the authorities, that a prisoner is entitled to the testimony of such witnesses as he may suggest, and even that he is entitled to take their testimony by deposition when desired, but that all knowledge or information concerning the charge may be suppressed and withheld from the prisoner so that it is impossible for him to know what witnesses he may desire to call or what issue he may wish to refute or establish.

It is idle to say that he was informed by the statement that he was "unlawfully here". This charge might have embraced a variety of wholly different acts or omissions, any one of which may have been committed or omitted at any time during a period of residence long prior to 1892.

Such proceedings come within the class of unfair prosecutions which have uniformly been held to require the court to exercise its discretion by issuing its writ of habeas corpus, and, where necessary, by discharging the prisoner.

Chin Yow vs. U. S., 208 U. S. 8.

Re Can Pon, 168 Fed. 479.

Re Monaco, 86 Fed. 117.

Rodgers vs. U. S., 152 Fed. 346.

U. S. vs. Nakashima, 160 Fed. 842.

The court below repeatedly described the proceedings

against the accused as arbitrary in their nature, and we respectfully submit that where the certificate of residence of the accused is seized and taken from him, which seizure results in substantial embarrassment in the preparation of the defense of the accused, and where after a period of many years residence in the United States the only charge against the accused is that he is 'unlawfully' here, in the face of his certificate, which stands uncancelled and unrevoked, presents no issue which any court has jurisdiction to try, or, at least, renders the proceedings unfair and oppressive in failing to accord to the accused an opportunity properly to defend himself, which in reality means a denial of due process.

The order discharging the accused was justified upon this ground alone.

But assuming that the doctrine announced in *ex parte Royall* and other analogous cases is applicable to the case at bar, nevertheless we say that circumstances of an urgent character existed, which not only justified, but required the court to issue the writ in the first instance and to inquire into the cause of the prisoner's detention and to discharge him from custody. In the first place the matter involved the right of a subject of a foreign nation with whom we enjoy treaty relations to remain in our country. While it affected individually the rights of a person in humble circumstances and in a lowly walk of life, it was one of the very class of cases excepted by

Mr. Justice Harlan from the operation of the doctrine announced in *ex Parte Royall*. Mr. Justice Harlan said:

"In such and like cases of urgency involving the authority and operations of the general government or the obligations of this country to or its relations with foreign nations, the courts of the United States have frequently interposed by writs of habeas corpus and discharged prisoners who were held in custody under state authority."

A fortiori a Federal Court should so interpose in such a case when the prisoner is held under Federal process. No one can read the learned dissenting opinions of Mr. Justice Brewer in the case of *Ju Toy vs. U. S.*, 198 U. S. 253 and in *Lem Moon Sing vs. U. S.*, 158 U. S. 538, and in other cases and fail to realize the importance of the subject even in its application to the humblest subject of any foreign nation.

Moreover, the writ was returnable on March 3, 1913. This was the last day upon which the district judge had power to sit in the district of Arizona.

The recess appointment under which the learned judge acted expired on the following day. It was well known that many months would elapse before a district judge would be appointed and could qualify in the district of Arizona. In fact, such a judge did not qualify in the district of Arizona until August 26, 1913. Meanwhile had the matter proceeded before the Commissioner, and the

proceeding had resulted adversely to the accused, he could not have obtained bail pending appeal from such adverse decision, and although he might have been entitled to a discharge he would have been deported before he could have secured relief.

Although an appeal could have been prosecuted from an adverse order of the Commissioner in the absence of a District Judge the appeal would not have stayed the execution of the order and he would have been deported unless an order from the district judge was secured.

U. S. v. Loy Too, 147 Fed. 750. Affirmed.

Toy Gaup v. U. S., 152 Fed. 1022.

We respectfully submit that these circumstances, coupled with the judge's conclusion that the deportation proceedings were in reality purely arbitrary and were being oppressively conducted, were amply sufficient to justify the exercise of the court's discretion in granting the writ and discharging the prisoner.

Finally, upon the pleadings the court could only have ruled as it did.

The return set up nothing but conclusions of law and denials of legal conclusions and immaterial averments contained in the petition. Such a return is insufficient and entitled the prisoner to his discharge.

Strelton v. Shaheen, 176 Fed. 735.

Re Doo Woon, 18 Fed. 898, 899.

Hamilton v. McClaughry, 136 Fed. 445, 447, 448.

As was said in *Re Moyer*, 85 Pac. 190, page 192:

"It is urged by counsel for petitioner that certain averments in the petition for the writ are not controverted by the return. The latter is not treated as an answer to the application, but rather as a response to the writ itself. The averments of the petition are made for the purpose of obtaining the writ, and the respondent, in his answer thereto, simply seeks to relieve himself from the imputation of having imprisoned petitioner without lawful authority, and this he does, or, rather, is required to do, under the law by statements in the return from which the legality of the imprisonment is to be determined, without regard to the statements of the petition for the writ. In short, he is not required to make any issue on the petition for the writ, but to answer the writ. *In re Chipchase*, 56 Kan. 357, 43 Pac. 264; *ex parte Durbin* (Mo. Sup.) 14 S. W. 821; *Simmons v. Georgia Iron & Coal Co.* (Ga.) 43 S. E. 780, 61 L. R. A. 739."

But the appellant contends that the court exceeded its authority in adjudging the accused to be lawfully within the United States and in determining his right to remain here.

This issue was presented to the court, and, as we have seen, there was nothing to indicate anything to the contrary. The question could have been litigated by the Government had it seen fit to do so.

That the Government declined to do so is of no legal consequence to the accused and should be of no consequence to the court.

The accused was entitled to his adjudication just as the parties to any judicial proceeding are entitled to a determination of the issues before the court. The fact that the adjudication which he secured would bar subsequent proceedings involving the same charge is a substantial right of which the accused should not be deprived.

In Re Neagle 135 U. S. I.

U. S. vs. Chun Shee, 71 Fed. 277; Affd. 9th C. C. A.  
76 Fed. 951.

Leung Jun v. U. S., 171 Fed. 413.

If the prosecution had witnesses such as are described in the fourth assignment of error, we respectfully submit that the only error committed in the proceedings in the court below was committed by our learned opponent and not by the court in failing to call such witnesses, and that this error is not ground for reversal.

In view of the foregoing discussion, we see nothing in the brief of our learned opponent which requires specific attention except to point out that some of the cases cited have no application to the matters in controversy.

Thus the case of U. S. vs. Stevens, 16 Fed. 101, cited to support the claim that the common law rule of surrender was identical with that prescribed by Section 1018 was a criminal and not a civil case and is therefore not applicable here.

So also it is unnecessary to burden the court with a specific analysis of every case cited.

Cases in which the court has declined to take from a subordinate court or officer the decision of issues of fact, or which announce the familiar principle that a writ of habeas corpus may not be used to perform the functions of a writ of error or an appeal, require no comment.

We believe that every case cited falls within one of these classes or within the principal of *Ex parte Royall* —which we have already fully discussed, and we believe are readily distinguishable from the case at bar.

We therefore respectfully submit that the record before the court shows that the accused was lawfully in the United States at the time of his apprehension and detention. The court below had jurisdiction to inquire into that detention and for the reasons stated, exercised its discretion properly in discharging the prisoner.

We, therefore, ask that the order of the court below be affirmed.

Respectfully submitted,  
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San Francisco, October 8, 1913.  
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